TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM [redacted] 1956

No. [redacted] 76

UNITED STATES, PETITIONER

vs.

STEPHEN ROBERT DEMKO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 27, 1956
CERTIORARI GRANTED OCTOBER 8, 1956

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1039

UNITED STATES, PETITIONER

vs.

STEPHEN ROBERT DEMKO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

INDEX

[fol. A]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15,087

[File Endorsement Omitted]

STEPHEN ROBERT DEMKO

v.

UNITED STATES OF AMERICA, APPELLANT

ON APPEAL FROM A JUDGMENT OF
THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF PENNSYLVANIA

APPENDIX FOR THE UNITED STATES—Filed December 8, 1964

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* * * *

[fol. 1]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

No. 63-803 Civil Action

STEPHEN ROBERT DEMKO

v.

UNITED STATES OF AMERICA

RELEVANT DOCKET ENTRIES

DOC. NO.	DATE	DOCKET ENTRIES
	1963	
1	Sept. 18	Complaint filed.
3	Nov. 18	Motion for Summary Judgment filed by deft.
6	Dec. 4	Hearing on Motion for Summary Judgment begun and concluded C.A.V. before Gourley, J. Hearing memo filed. (Rep: J. Lilienthal) (Oral opinion on record)
7	Dec. 4	Orded entered directing that motion entitled "Notice of Motion for Summary Judgment" was considered as a motion to dismiss and same is hereby denied. (Gourley, J.)
	1964	
19	July 13	Stipulation filed and Order entered directing that Judgment be and hereby is entered in favor of pltf. Stephen Robert Demko and against the deft. the United States of America in the amount of $20,000.00. (Gourley, J.)

[fol. 2]

	1964	
20	July 14	Pursuant to Order entered, Judgment on Decision by the Court filed by the Clerk and Judgment is hereby entered accordingly. James H. Wallace, Jr., Clerk
	July 14	Notice mailed.
21	Sept. 3	Notice of appeal filed by U.S. Attorney.

[fol. 3]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 63-803

[Title Omitted]

COMPLAINT—Filed September 18, 1963

Stephen Robert Demko brings this action against the United States of America upon a cause of action whereof the following is a statement:

FIRST: The plaintiff, Stephen Robert Demko, resides at 3458 Beechwood Boulevard, Pittsburgh, Allegheny County, Pennsylvania.

SECOND: On or about March 12, 1962, plaintiff, Stephen Robert Demko, was an inmate of the Lewisburg Penitentiary, Lewisburg, Pennsylvania, pursuant to sentence imposed by the Honorable Rabe Marsh of this Court under the provisions of 18 USCA 4208 (b) for interstate transportation of fraudulent checks.

THIRD: While confined under said sentence, plaintiff, on said date at about 10:00 A.M. thereof, was ordered and directed to replace blown out windows in the Lewisburg Penitentiary power plant. At the direction of the construction supervisor, plaintiff was required to climb

up cat-like on the beams of the wall and precariously balance himself on an angle-iron cross bar placed upon two steel beams, placing one hand against the wall and [fol. 4] with the other hand manipulate a 40x60 inch plate of glass into a rubber gasket through the use of a screw driver.

FOURTH: While plaintiff attempted to balance himself in this position and insert the window into the gasket, the glass broke, catapulting plaintiff to the outside and causing him to fall a distance of thirty-seven (37) feet.

FIFTH: The accident was the proximate result of the negligence and gross negligence of the defendant and its employees or servants acting within the scope of their authority in the following particulars:

(a) In failing to provide step-ladders and scaffolding essential for the safety of the plaintiff in performing the assignment required of him.

(b) In exposing plaintiff to extreme danger in violation of the duty which the United States of America owes to the care and protection of prisoners confined to its penal institutions.

SIXTH: As a result of the aforesaid negligence and gross negligence of the defendant and its employees or servants, the plaintiff, Stephen Robert Demko, has suffered severe and permanent injuries:

He suffered comminuted fractures of the ankle and tibia of the right foot.

He suffered paralysis of the right foot.

[fol. 5] He suffered injuries and damage to the muscles, ligaments, bones, joints, tissues, nerves and intervertebral discs of the back and spine.

He sustained a concussion of the brain, and that by reason of said injuries he sustained a laceration, rupture, and dissociation of the brain cells, brain matter, coverings of the brain and other parts of the head and brain structure and a severe hemorrhage within the brain as to bring about a severe concussion and destruction of the brain, and that by reason of said injuries, his brain function and capacity has been greatly diminished, weak-

ened, and impaired; that by reason of said injuries he suffers terrific pains in the head, headaches, unusual and extraordinary fullness and pressure within the head, temporary blackouts, dizziness, lack of concentration, coordination and equilibrium.

He sustained a severe shock to his general and central nervous system by reason of all of said injuries, and his general health has become greatly weakened and impaired by reason of said injuries. He suffers severe spells of dizziness, headaches, melancholy and insomina by reason of said injuries; he has been sick, sore and disabled ever since sustaining said injuries, and will continue to be sick, sore and disabled by reason of said injuries for the rest of his life. He will suffer a total and permanent impairment of his earning power.

[fol. 6] SEVENTH: This action is brought in accordance and conformity with the provisions of the Act of Congress dated June 25, 1948, 62 Stat. 992, 28 U.S.C.A. Sections 1346 (b), 1402, 2401 (b), 2402, 2511, 2512 (b), 2671-2680 (1950) otherwise known as Federal Tort Claims Act.

WHEREFORE, plaintiff demands of defendant, the United States of America, damages in excess of the jurisdiction of the United States Court.

Hence this suit.

/s/ GERALD N. ZISKIND
Attorney for Plaintiff

[fol. 7]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MOTION FOR SUMMARY JUDGMENT—Filed November 18, 1963

Defendant, United States of America, pursuant to Rule 56 of the Federal Rules of Civil Procedure, respectfully moves for summary judgment in the above-entitled action on the ground that the Court is without jurisdiction in that the plaintiff's exclusive remedy is the compensation available under Title 18, United States Code, Section 4126. Plaintiff has made claim for and received compensation benefits under said Compensation law.

In support of this motion, defendant attaches hereto and makes a part hereof, the affidavit of Edward L. Barteet, and a certified copy of the award of compensation to the plaintiff pursuant to 18 U.S.C. 4126.

GUSTAVE DIAMOND
United States Attorney

STANLEY W. GREENFIELD
Assistant U. S. Attorney
633 New Federal Building
Pittsburgh 19, Pennsylvania

Attorneys for Defendant,
United States of America

Of Counsel:

J. CHARLES KRUSE
Attorney
Department of Justice
Washington, D.C.

[fol. 8] CERTIFICATE ATTACHED TO MOTION FOR SUMMARY JUDGMENT

District of Columbia) ss:

I, Edward L. Barteet, certify that I am the Administrative Officer of Federal Prison Industries, Inc., and in that capacity I am custodian of the original Awards of Accident Compensation made pursuant to the provisions of Section 4126, Title 18, United States Code.

I further certify that the attached document is a true and accurate copy of an official document, the recommendation and approval of an award in the sum of $180.00 per month to Stephen Robert Demko for an injury to his ankle.

In Witness Whereof, I have hereunto set my hand this 14 day of November, 1963.

/s/
EDWARD L. BARTEET
Administrative Officer
Federal Prison Industries, Inc.

[fol. 9] AFFIDAVIT ATTACHED TO MOTION FOR SUMMARY JUDGMENT

District of Columbia) ss:

I, Edward L. Barteet, am Administrative Officer of Federal Prison Industries, Inc., and as such, I am in charge of the Accounting Officer for that government corporation.

Our records indicate that Stephen Robert Demko is currently being paid the sum of $180.00 per month pur-

suant to the provisions of section 4126, Title 18, United States Code.

/s/
EDWARD L. BARTEET
Administrative Officer
Federal Prison Industries, Inc.

[attestation omitted]

[fol. 10]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MEMORANDUM ORDER—November 27, 1963

This is an action under the Federal Tort Claims Act in which it is alleged that plaintiff on March 12, 1962 was injured due to the negligence of the Superintendent and his associate supervising employees at the Lewisburg Penitentiary in directing the plaintiff inmate to perform certain services at the institution which placed him in a precarious situation and resulted in his falling, and serious injuries were sustained.

The immediate matter before the court is a motion for summary judgment on the part of the United States of America.

It is contended that under the provisions of section 4126, Title 18, United States Code, the sole remedy of an inmate of a penal institution is controlled by the compensation provisions of said Act provided, however, compensation paid shall not be greater than that provided in the Federal Employees' Compensation Act.

Unquestionably, before the case of United States v. Muniz, 372 U.S. 150, the law was in somewhat of a state of confusion since the decisions of the circuits were at variance. This case specifically determines that a federal prisoner can sue under the Federal Tort Claims Act to

recover damages from the United States for personal injuries sustained during confinement in a federal penitentiary and resulting from negligence of a government employee.

However, it is true that in the Supreme Court decision [fol. 11] the plaintiffs were not performing employment at the institution where they were confined.

It, therefore, appears that most extensive briefs should be presented to the Court as to whether the decision of the Supreme Court does or does not have application to the facts which exist in this proceeding. Said briefs are to be filed with this member of the Court on or before December 3, 1963, and the matter is fixed for argument before this member of the court on Wednesday, December 4, 1963, at 10:00 A.M.

If counsel for the parties fail or neglect to comply with the terms and provisions of this Order as to the filing of briefs and appearing for argument, appropriate sanctions will be imposed on offending counsel.

Dated: November 27, 1963

/s/ WALLACE S. GOURLEY, CDJ
Chief Judge

cc: Gerald Ziskind, Esq.
2602 Grant Bldg.

United States Attorney

[fol. 12]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ORDER—December 4, 1963

In this proceeding the immediate matter before the Court is entitled "Notice of Motion for Summary Judgment" but since an answer has not been filed to the complaint, it in reality is a motion to dismiss the complaint and the Court will consider the motion in said category.

After a full and complete hearing, consideration of the briefs of counsel, and most extended argument, the Court is of the considered judgment that the motion to dismiss should be denied.

NOW, THEREFORE, this 4th day of December, 1963, the motion entitled "Notice of Motion for Summary Judgment" is considered as a motion to dismiss the complaint and it is hereby denied.

/s/ WALLACE S. GOURLEY, CDJ
Chief Judge

cc: Gerald N. Ziskind, Esq.
2602 Grant Building

Gustave Diamond, Esq.
United States Attorney

[fol. 13]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

STIPULATION AND ORDER—Filed July 13, 1964

It is stipulated between the parties that:

I.

This is an action for money damages for personal injury, brought pursuant to the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 et seq.

II.

Defendant admits that the negligence of the employees of the United States was the proximate cause of the plaintiff's injuries which are the subject of this suit.

III.

The amount of $20,000.00 in addition to the compensation received and compensation to be paid, would adequately compensate the plaintiff for the injury sustained.

IV.

Defendant's defense that plaintiff's right to compensation pursuant to 18 U.S.C. 4126 is an exclusive remedy which bars suit under the Federal Tort Claims Act was asserted by way of Motion for Summary Judgment. Both parties filed briefs and presented oral argument on the Motion for Summary Judgment. On December 4, 1963 the Court entered an order denying the Motion.

V.

Based upon the Court's determination that the plaintiff's right to compensation does not bar suit under the Federal Tort Claims Act, the parties agree that the plaintiff is entitled to a judgment in the amount of $20,000.00.

[fol. 14]

VI.

Upon the entry of final judgment defendant reserves the right to further litigate the question of whether the plaintiff's right to compensation pursuant to 18 U.S.C. 4126 bars suit under the Federal Tort Claims Act, the issue resolved adversely to the United States in the Court's interlocutory order of December 4, 1963.

VII.

The plaintiff's right to compensation pursuant to 18 U.S.C. 4126 is not affected by this suit. Regardless of the outcome of this suit the plaintiff will have the same right to compensation as if suit had not been instituted.

STIPULATED AND AGREED

GERALD ZISKIND
Attorney for Plaintiff

GUSTAVE DIAMOND
United States Attorney

STANLEY W. GREENFIELD
Assistant U. S. Attorney
Attorneys for Defendant

OF COUNSEL:

J. CHARLES KRUSE, Attorney
U. S. Department of Justice

[fol. 15] ORDER—July 13, 1964

And now, this 13 day of July, 1964, based upon Stipulation of the parties as hereto attached and made a part hereof, it is ordered and decreed that judgment will be and hereby is entered in favor of Stephen Robert Demko, plaintiff, and against the United States of America, defendant, in the amount of $20,000.00.

/s/ WALLACE S. GOURLEY
Chief Judge

[fol. 16]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL PRISON INDUSTRIES, INC.
WASHINGTON, D.C.

INMATE ACCIDENT COMPENSATION
REGULATIONS

1. To carry out the intent of Congress in authorizing the payment of accident compensation to inmates or their dependents for injuries sustained while employed by Federal Prison Industries, Inc., or in any work activity in connection with the maintenance or operation of the institution where confined, and pursuant to Section 4126 of Title 18, United States Code, and authority delegated by the Attorney General and the Board of Directors of Federal Prison Industries, Inc., the following regulations are prescribed to insure complete reports covering all injuries and full information to permit prompt action on claims submitted.

ACTION TO BE TAKEN AND REPORTS TO BE
SUBMITTED ON ALL INJURIES

MEDICAL ATTENTION

2. Whenever an inmate worker is injured while in the performance of assigned duty, regardless of how trivial

the hurt may appear, he shall report the injury to his official superior who will take whatever action is necessary to secure for the injured such first aid, medical or hospital treatment as may be necessary for the proper treatment of the injury. Medical, surgical and hospital service will be furnished by the medical officers of the institution. Refusal by an inmate worker to accept such medical, surgical, hospital or first aid treatment may cause forfeiture of any claim for accident compensation for disability resulting therefrom.

RECORD OF INJURY AND INITIAL CLAIM

3. After initiating necessary action for medical attention the work detail supervisor shall immediately secure a record of the cause, nature and extent of the injury, and shall see that the injured inmate submits within 48 hours FPI Form 45, entitled "Inmate Worker's Notice of Injury and Original Claim for Compensation and Medical Treatment." The names and testimony of all witnesses shall be secured and, if the injury resulted from the [fol. 17] operation of mechanical equipment, an identifying description of the machine or instrument causing the injury shall be given.

REPORT OF INJURY

4. All injuries resulting in disability of the injured for work beyond the day, shift, or turn in which it occurs shall be reported by the inmate's work detail supervisor on Administrative Form 19, in accordance with instruction sheet, Administrative Form 19a. After review by the institution safety inspector, or his appointed equivalent, for completeness, the report shall be delivered to the Warden or Superintendent of the institution; and then forwarded promptly to the Safety Administrator in the Washington office, accompanied by FPI Form 45 executed by the injured inmate worker. All questions shall be answered in complete detail. The physician's statement must be secured on Administrative Form 19 whenever the injury is such as to require the attention of a physician.

In the case of an injury to an inmate sustained while employed in any work activity in connection with the maintenance or operation of the institution where confined, the reports and treatment of such injured inmate shall be made under the regulations in effect at the time of such injury and the reports as to treatment and the cause, nature and extent of the injury shall be made to comply as nearly as possible with the requirements of paragraphs 2, 3, and 4 of these regulations.

PRE-RELEASE CLAIM FOR COMPENSATION

5. As soon as release date is determined, but not in advance of thirty days prior to release date, each inmate injured in industries or on an institutional work assignment during his confinement shall be given FPI Form 43 Revised and advised of his rights to make out his claim for compensation. Every assistance shall be given him to properly prepare the claim. In each case a physical examination shall be given and a definite statement made as to the effect of the alleged injury on the inmate's earning capacity after release. Failure to submit to a final physical examination before release shall result in the forfeiture of all rights to compensation or future medical treatment. In each case of visible impairment, disfigurement, or loss of member, photographs shall be taken to show actual condition and shall be transmitted with FPI Form 43.

6. The claim, after preparation and execution by the inmate, shall be completed by the physicial making the [fol. 18] final examination and by the parole or social service officer and forwarded promptly to the Safety Administrator in the Washington office accompanied by, or reference made to, Form 19, Report of Institutional Injury and FPI Form 45, Inmate Worker's Notice of Injury and Original Claim.

REPORT OF RECURRENCE OF DISABILITY

7. When an inmate worker has been injured and has later returned to work and then subsequently there is a recurrence of disability from said injury, a complete re-

port shall be made with appropriate reference to previous reports covering the initial injury.

REPORT OF DEATH

8. If an injury results in death before the report of injury on Administrative Form 19 has been forwarded to the Safety Administrator, the death shall be reported on FPI Form 43, which shall accompany the Report of Injury. If death results after the Report of Injury has been forwarded a report of the death on FPI Form 43 shall be sent at once to the Safety Administrator.

REPORT OF ACCIDENT PRONENESS

9. If an inmate worker is injured more than once in a comparatively short time and the circumstances of the injury indicate an awkwardness or ineptitude that in the opinion of his work supervisor implies a danger of further accidents in the tasks assigned, the inmate shall be relieved of the performance of the task, and assigned another task if permissible or a report of the circumstances shall be made to the Institution Safety Inspector and the Classification Committee with a request that the inmate be transferred to another assignment.

COMPENSATION FOR INJURIES

NON-COMPENSABLE INJURIES

10. Injuries sustained by inmate workers willfully or with intent to injure someone else, or injuries fuffered in any activity not directly related to their work assignment are not compensable, and no claim for compensation for such injuries will be considered. Disregard of safety rules and instructions, failure to use available safety clothing and equipment, or an act to make safety equipment inoperative shall result in a transfer to another assignment. Any injury resulting from willful violation of rules and regulations may prevent award of compensation.

[fol. 19] COMPENSATION FOR LOST TIME

11. No accident compensation will be paid for compensable injuries while the injured inmate remains in the institution. However, inmates assigned to Industries will be paid for the number of regular work hours in excess of three consecutive inmate man-days they are absent from work because of injuries suffered while in performance of their work assignments. The rate of pay shall be the standard hourly rate for the grade, including longevity if applicable, regardless of the pay plan, but shall exclude any overtime or production bonus. No claim for compensation will be considered if full recovery occurs while the injured is in custody and no significant disability remains after release.

COMPENSATION AWARDS

12. The amount of accident compensation as authorized under Section 1 shall be determined as the time of release regardless of when during the periods of incarceration of the applicant the injury was sustained or of any payment made in lieu of regular earnings or any medical or surgical services furnished prior to such release.

ESTABLISHING THE AMOUNT OF THE AWARD

13. In determining the amount of accident compensation to be paid consideration will given to the permanency and severity of the injury and its resulting effect on the earning capacity of the inmate in connection with employment, after release. The provisions of the Federal Employee's Compensation Act shall be followed when applicable. The minimum wage prescribed by the Fair Labor Standards Act applicable at the time of release shall be used as the wage basis in determining the amount of such compensation. In no event shall compensation be paid in greater amount than that provided in the Federal Employee's Compensation Act. (Title 18, United States Code 4126).

TIME AND METHOD OF PAYMENT OF COMPENSATION CLAIM

14. Upon determination of the amount of compensation to be paid a copy of the award will be furnished the

claimant and monthly payments will begin about the tenth day of the first month following the month in which the award is effective. The first payment is usually within 45 days of release from institution. Payments shall be made through the office of the United States Probation Officer of the district in which the claimant resides. Lump sum payments will be made only in exceptional cases where it is clearly shown to be beneficial and necessary for the support of the claimant or dependents.
[fol. 20] 15. When requested by the claimant and approved by the Corporation, accident compensation may be paid direct to dependents of the claimant. In all cases claimant must indicate in detail those persons who are dependent on him, their relationship and all facts as to residence, other income, etc., so that the Corporation will be able to determine to what extent they are dependent on the claimant.

COMPENSATION SUSPENDED BY MISCONDUCT

16. Awarded compensation shall be paid only so long as the claimant conducts himself or herself in a lawful manner and shall be immediately suspended upon conviction of any crime, or upon incarceration in any jail, correctional, or penal institution. However, the Corporation may pay such compensation or any part of it to the inmate or any dependents of such inmate where and as long as it is deemed to be in the public interest.

MEDICAL TREATMENT REQUIRED FOLLOWING DISCHARGE

17. If medical or hospital treatment is required subsequent to discharge from the institution, for an injury sustained while employed by Federal Prison Industries, Inc., or on an institutional work assignment, claimant should advise the Commissioner of Industries and if the cost of such treatment is allowed by the Corporation advice to this effect and instructions for obtaining such service will be forwarded. The Corporation will under no circumstances pay the cost of medical, hospital treatment or any related expense not previously authorized by it.

CIVILIAN COMPENSATION LAWS DISTINGUISHED

18. Compensation awarded hereunder differs from awards made under civilian workmen's compensation laws in that hospitalization is usually completed prior to the inmate's release from the institution and, except for a three day waiting period, the inmate received pay while absent from work. Other factors necessarily must be considered that do not enter into the administration of civilian workmen's compensation laws.

EMPLOYMENT OF ATTORNEYS

19. It is not necessary that claimants employ attorneys or others to effect collection of their claims, and under no circumstances will the assignment of any claim be recognized.

[fol. 21] *These regulations shall be effective as of September 26, 1961.*

Approved this 1st day of *February, 1962.*

JAMES V. BENNETT
Commissioner
Federal Prison Industries, Inc.

[fol. 22]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15087

[File Endorsement Omitted]

STEPHEN ROBERT DEMKO

v.

UNITED STATES OF AMERICA, APPELLANT

ON APPEAL FROM A JUDGMENT OF
THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF PENNSYLVANIA

**SUPPLEMENTAL APPENDIX FOR THE
UNITED STATES—Filed February 11, 1965**

* * * *

[fol. 23]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CIV MO 310 OPIN 273

30740

U.S. District Court
Filed
Jan 6 1965
4:15 pm
S.D. of N.Y.

64 Civil 1447

LOUIS H. GRANADE, PLAINTIFF

against

UNITED STATES OF AMERICA, DEFENDANT

OPINION—January 6, 1965

PALMIERI, J.

This is a motion by the Government for summary judgment pursuant to Fed. R. Civ. P. 56 for failure to state a claim upon which relief may be granted.

On September 13, 1962, the plaintiff was a prisoner at the Federal House of Dention in New York City. On that day, he was injured while engaged in the performance of duties assigned to him. He instituted this action pursuant to 28 U.S.C. §§ 1346(b), 2671 *et seq.*, the Federal Tort Claims Act.

It is undisputed that the plaintiff's injury is compensable under 18 U.S.C. § 4126, which provides in part:

[fol. 24] The corporation [Federal Prison Industries, Inc.] . . . is authorized to employ the fund, and any earnings that may accrue to the corporation, as operating capital in performing the duties imposed by this chapter; . . . in paying, under rules and regulations promulgated by the Attorney General, . . . [the] *compensation to inmates* or their dependents *for injuries suffered in any industry or in any work activity in connection with the maintenance or opera-*

> *tion of the institution where confined.* In no event shall compensation be paid in a greater amount than that provided in the Federal Employees' Compensation Act. (Emphasis added.)

The only question is whether this section provides the plaintiff's sole remedy. If it does, the plaintiff cannot maintain his suit under the Federal Tort Claims Act and summary judgment should be granted.

The entire statutory scheme of remedies against the Government is based on the principle that where there is a remedy available in the form of a compensation system, there is no concurrent right to sue under the Federal Tort Claims Act. *E.g.*, *Patterson* v. *United States*, 359 U.S. 495, 496 (1959); *Johansen* v. *United States*, 343 U.S. 427, 439 (1951); *Feres* v. *United States*, 340 U.S. 135 (1950); *Balancio* v. *United States*, 267, F.2d 135 (2d [fol. 25] Cir. 1959); *Aubrey* v. *United States*, 254 F.2d 768 (D.C. Cir 1958); *Nobles* v. *Federal Prison Industries*, 213 F. Supp. 731 (N.D. Ga. 1963).

The plaintiff relies on *United States* v. *Muniz*, 374 U.S. 150 (1963), for the proposition that he may maintain this action. That case, however, does not support him. The sole issue presented by that case was whether an inmate in a federal penitentiary could maintain a suit against the United States for negligent injury under the Federal Tort Claims Act. The Supreme Court held such a suit was permissible. No compensation act was involved nor was there any question with respect to the exclusiveness of remedies.

It follows from what has been said that the plaintiff may not maintain this action.

The defendant's motion for summary judgment is granted.

SUBMIT ORDER ON NOTICE.

Dated: New York, N.Y.
January 6, 1965

/s/ EDMUND L. PALMIERI
EDMUND L. PALMIERI
U. S. D. J.

[fol. 26]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15,087

[File Endorsement Omitted]

[Title Omitted]

STIPULATION FOR EXTENSION OF TIME IN WHICH TO FILE APPELLANT'S BRIEF—Filed October 28, 1964

The record on appeal having been docketed in the Court of Appeals on October 8, 1964, under the Rules of the Court appellant's brief is presently due to be filed on November 7, 1964. It is hereby

STIPULATED and AGREED by counsel for appellant and appellee that the time in which to file appellant's brief may be extended to and including Monday, December 7, 1964.

/s/ Morton Hollander

/s/ Richard S. Salzman
Attorneys,
Department of Justice,
Washington, D.C. 20530.
Counsel for Appellant.

/s/ Gerald N. Ziskind
2602 Grant Building
Pittsburgh, Pennsylvania
Counsel for Appellee.

SO ORDERED:

Dated: Oct 28, 1964.

/s/ William H. Hastie
Circuit Judge

[fol. 27]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15,087

[File Endorsement Omitted]

[Title Omitted]

STIPULATION FOR EXTENSION OF TIME IN WHICH TO FILE APPELLEE'S BRIEF—Filed December 28, 1964

The record on appeal having been docketed in the Court of Appeals on October 8, 1964, and Appellant, by Stipulation and Order of this Court, having filed its Brief prior to the date of Stipulation of December 7, 1964, it is hereby

STIPULATED and AGREED by counsel for Appellant and Appellee that the time in which to file Appellee's Brief may be extended to and including Monday, February 8, 1965.

MORTON HOLLANDER

RICHARD S. SALZMAN
Attorneys,
Department of Justice,
Washington, D.C. 20530
Counsel for Appellant.

GERALD N. ZISKIND
2602 Grant Building
Pittsburgh, Pennsylvania
Counsel for Appellee.

SO ORDERED:

Dated: Dec. 28, 1964.

WILLIAM H. HASTIE
Circuit Judge

[fol. 28]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15087

[File Endorsement Omitted]

STEPHEN ROBERT DEMKO

v.

UNITED STATES OF AMERICA, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued April 9, 1965

Before GANEY and FREEDMAN, *Circuit Judges*, and KIRKPATRICK, *District Judge*

OPINION OF THE COURT—Filed September 21, 1965

By FREEDMAN, *Circuit Judge.*

Plaintiff brought this suit under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671, *et seq.*, for damages for personal injuries sustained on March 12, 1962 while performing maintenance work which he was ordered to do as an inmate of the Federal Penitentiary at Lewisburg, Pennsylvania. On his release from prison he was awarded compensation of $180 monthly from Federal Prison Industries, Inc., under 18 U.S.C. § 4126. He later brought this action, which the Government moved to dismiss on the ground that the compensation payments were [fol. 29] his exclusive remedy. The motion to dismiss was denied.[1] The parties later entered into a stipulation in

[1] The motion was for summary judgment but the court below treated it as a motion to dismiss the complaint because no answer

which the Government admitted its negligence, agreed that $20,000 in addition to the compensation already received and to be paid in the future would adequately compensate the plantiff for his injuries, and that on the basis of the District Court's decision plaintiff was entitled to a judgment in the amount of $20,000. The stipulation reserved the Government's right to maintain its defense on appeal and provided that the plaintiff's right to compensation would not be affected by the present action. Pursuant to this stipulation judgment was entered in favor of the plaintiff and against the United States in the amount of $20,000. From this judgment the Government has appealed.

The question is whether § 4126 of Title 18 is plaintiff's exclusive remedy and bars the present action under the Federal Tort Claims Act.[2] Section 4126 provides that all moneys under the control of Federal Prison Industries or received from the sale of its products or by-products or for the services of federal prisoners, shall be maintained in a Prison Industries Fund in the Treasury of the United States. The section also provides, in part, that the fund may be employed "in paying, under rules and regulations promulgated by the Attorney General, . . . compensation to inmates or their dependents for injuries suffered in any industry." In 1961 the section was amended by adding a provision for compensation for injuries suffered by inmates "in any work activity in connection with the maintenance or operation of the institution where confined."[3] The purpose of the amendment was to eliminate [fol. 30] the discriminatory difference in treatment between prisoners employed in activities of Federal Prison

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to the complaint had been filed although the motion was accompanied by affidavits. Cf. Rule 12(b). In view of the subsequent judgment, this procedural detail need not be reviewed.

[2] The cases are divided. The Government's view prevailed in Nobles v. Federal Prison Industries, Inc., 213 F.Supp. 731 (N.D.Ga. 1963); Granade v. United States, 237 F.Supp. 211 (S.D.N.Y. 1965), appeal pending. Plaintiff's view prevailed in Gomez v. United States, —— F.Supp. —— (D.C.Colo. 1965) (34 Law Week 2055 (July 27, 1965)).

[3] Act of September 26, 1961, Pub. L. 87-317, 75 Stat. 681, 18 U.S.C. § 4126.

Industires, who were afforded compensation for injuries, and prisoners working in various other institutional and maintenance operations, who were not entitled to compensation.[4]

In *United States* v. *Muniz*, 374 U.S. 150 (1963), the Supreme Court recently made it clear that claims against the United States for personal injuries sustained by inmates of federal prisons resulting from the negligence of government employees are within the Federal Tort Claims Act. The opinion was written by the Chief Justice for a unanimous Court. Its avowed purpose was to explore fully the intent of Congress in adopting the Federal Tort Claims Act, and it reviewed the effect of compensation benefits on the remedy afforded by the Act. It therefore points the way to our conclusion. The Court, after examining the circumstances surrounding the adoption of the Act, concluded that "it is clear that Congress intended to waive sovereign immunity in cases arising from prisoners' claims." (374 U.S., at 158). The Court rejected the Government's argument that an exception should be implied because of the requirements of prison discipline, and because of *Feres* v. *United States*, 340 U.S. 135 (1950), which held that the United States was not liable under the Act for injuries sustained by a member of the armed forces in the course of activity incident to his military service. Finding that the ultimate justification for the *Feres* decision was the necessity of maintaining military discipline, the Court declared that there was no such necessity in regard to prisoners, as was shown by the experience of those states which permitted suits by prisoners. But the Court also considered the language of *Feres* dealing with the effect of a compensation plan, saying: ". . . [T]he presence of a compensation system, persuasive in *Feres*, does not of necessity preclude a suit for negligence. [fol. 31] . . . [T]he compensation system in effect for prisoners in 1946 was not comprehensive. It provided compensation only for injuries incurred while engaged in prison industries. Neither Winston nor Muniz [the respondents] would have been covered." (374 U.S., at 160).

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[4] Sen. Rep. No. 1056 (87th Cong. 1st Sess., 1961), reprinted at 2 U. S. Code Congr. and Admin. News, 1961, p. 3028.

In a footnote the Court pointed out that even the broadened compensation coverage of prisoners provided by the amendment of 1961 failed to reach all prisoners, and added: "And, in any event, the compensation system still fails to provide for non-work injuries, contrary to that applicable to military personnel." (374 U.S., at 160, n. 17).

The Supreme Court's careful analysis of the intention of Congress in adopting the Federal Tort Claims Act in 1946 makes it clear that claims by prisoners for negligence fall within the Act and that this coverage is not to be cancelled whenever thereafter some alteration is made in the provision of compensation for prisoners. If such compensation is intended to create either an election of remedies or an obliteration of the remedy for tort, it is to be expected that Congress will express such intention in the compensation statute, especially if it does not establish a full and comprehensive plan.

Congress in adopting the amendment of 1961 to § 4126 gave no express indication that the compensation authorized by it was to be exclusive, and its provisions preclude the imputation of any such intention. The compensation scheme for prisoners is very different from the compensation system for servicemen which was described in *Feres* as being "simple, certain, and uniform" (340 U.S., at 144) at the time the Federal Tort Claims Act was passed in 1946. It is also vastly different from the right to compensation enjoyed by government employees under the Federal Employees Compensation Act. It is permissive rather than mandatory. The amount of the award rests entirely within the discretion of the Attorney General,[5] but may not under [fol. 32] the statute exceed the amount payable under the Federal Tort Claims Act. Compensation is paid only upon the inmate's release from prison and will be denied if full recovery occurs while he is in custody and no significant disability remains after his release.[6] There is no provision for the claimant to have a personal physician present at

[5] See Note, Denial of Prisoners' Claims Under the Federal Tort Claims Act, 63 Yale L. J. 418, 423 (1954).

[6] Federal Prison Industries, Inc., Inmate Accident Compensation Regulations § 11, 28 C.F.R. §§ 301.1, 301.2.

his psysical examination,[7] and there is no opportunity for administrative review.[8] Finally, compensation, even when granted, does not become a vested right, but is to be paid only so long as the claimant conducts himself in a lawful manner and may be immediately suspended upon conviction of any crime, or upon incarceration in a penal institution.[9]

What emerges on examination, therefore, is a severely restrictive system of compensation permeated at all levels by the very prison control and dominion which was at the origin of the inmate's injury. This discretionary and sketchy system of compensation, which would not even have covered the present plaintiff in 1946, may not be deemed the equivalent of compensation under the Federal Employees Compensation Act of 1916. Nowhere can there be found any indication that Congress intended that it should serve to exclude prisoners from the broad and sweeping policy embodied in the Federal Tort Claims Act.

The Government, however, argues that the *Muniz* case is not controlling here because the two prisoners involved in that case were not covered by any compensation plan, and that all that was said by the Court therefore was dicta. They urge that applicable here is the principle applied in *Johansen* v. *United States*, 343 U.S. 427 (1952),[10] [fol. 33] reaffirmed in *Patterson* v. *United States*, 359 U.S. 495 (1959). In *Johansen* the petitioners were injured in the performance of their duties as seamen. They were concededly within the Federal Employees Compensation Act (5 U.S.C. §§ 751, *et seq.*). They sued, however, to recover damages from the United States under the Public Vessels Act of 1925 (46 U.S.C. §§ 781, *et seq.*). The Court held that although the langauge of the Public Vessels Act

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[7] Compare Federal Employees Compensation Act, § 21, 5 U.S.C. § 771.

[8] Compare Federal Employees Compensation Act, § 37, as amended, 5 U.S.C. § 787.

[9] Federal Prison Industries, Inc., Inmate Accident Compensation Regulations § 16, 28 C.F.R. § 301.5.

[10] Affirming Johansen v. United States, 191 F.2d 162 (2 Cir. 1951), and Mandel v. United States, 191 F.2d 164 (3 Cir. 1951).

appeared to permit such a suit, its central purpose as ascertained from its legislative history and the circumstances surrounding its enactment, led to the conclusion that Congress did not intend it to confer the right to sue on claimants who were entitled to the benefits of the Federal Employees Compensation Act. Among the reasons for the Court's conclusion was the fact that the Federal Employees Compensation Act covers all government employees, to whom it brought the benefits of the socially desirable rule that society should share with the injured employee the costs of accidents incurred in the course of employment: "All in all we are convinced that the Federal Employees Compensation Act is the exclusive remedy for civilian seamen on public vessels. As the Government has created a comprehensive system to award payments for injuries, it should not be held to have made exceptions to that system without specific legislation to that effect." (343 U.S., at 441).[11]

Thus the essence of *Johansen* is that the Federal Employees Compensation Act is so comprehensive a system of coverage of all government employees that it is presumably intended to be their exclusive remedy.

The difference between the effect of general compensation available to government employees under the Federal Employees Compensation Act and that of compensation plans dealing with special circumstances, on rights under [fol. 34] the Federal Tort Claims Act is illustrated by *United States* v. *Brown*, 348 U.S. 110 (1954). It was there held that a veteran could maintain an action under the Federal Tort Claims Act for damages for negligent medical treatment in a Veterans Administration hospital aggravating a service-connected injury, even though he had received additional compensation because of the aggravation, since Congress had given no indication that the right of veterans to compensation was an exclusive

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[11] The 1949 amendment to the Federal Employees Compensation Act, which was passed after the Johansen case arose, expressly made the Act exclusive of other remedies against the United States.

remedy. Johansen was distinguished as involving a general workmen's compensation plan.[12]

The limited and discretionary compensation scheme provided by § 4126 is not comparable to the system of compensation provided for government employees by the Federal Employees Compensation Act. Limited as it is in both the scope of its coverage and the relief it extends, it is not such a broad and general system of compensation that it may be deemed impliedly to express a congressional intention to except federal prisoners injured in the course of their work as inmates from the remedial protection afforded by the Federal Tort Claims Act. The Act, as the Supreme Court has said, "provides much-needed relief to those suffering injury from the negligence of government employees. We should not, at the same time that state courts are striving to mitigate the hardships caused by sovereign immunity, narrow the remedies provided by Congress." *United States* v. *Muniz*, 374 U.S. 150, 165-66 (1963).

The judgment therefore will be affirmed.

* * * *

[12] Similarly, Brooks v. United States, 337 U.S. 49 (1949), holding that servicemen who recovered compensation for injuries were not barred from suing under the Federal Tort Claims Act if the injuries were sustained while on furlough. See also Annotation, 84 A.L.R.2d 1059.

[fol. 35] * * *

[fol. 36]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15087

[File Endorsement Omitted]

STEPHEN ROBERT DEMKO

v.

UNITED STATES OF AMERICA, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: GANEY and FREEDMAN, *Circuit Judges*, and KIRKPATRICK, *District Judge*

ORDER AMENDING OPINION—September 29, 1965

It is ORDERED that the opinion filed herein on September 21, 1965 be amended as follows:

The words "Federal Employees Compensation Act" are substituted for "Federal Tort Claims Act", on page 5, lines 1 and 2.

For THE COURT:

ABRAHAM L. FREEDMAN,
Circuit Judge.

[fol. 37]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15,087

[File Endorsement Omitted]

STEPHEN ROBERT DEMKO

vs.

UNITED STATES OF AMERICA, APPELLANT

(D.C. Civil No. 63-803)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: GANEY and FREEDMAN, *Circuit Judges*, and KIRKPATRICK, *District Judge*

JUDGMENT—September 21, 1965

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the District Court, filed July 14, 1964, be, and the same is hereby affirmed, with costs.

ATTEST:

/s/ Ida O. Creskoff
Clerk

September 21, 1965

Costs taxed in favor of appellee,
Stephen Robert Demko, as follows:

Brief for appellee $63.60

Certified as a true copy and issued in lieu of a formal mandate on October 7, 1965.

Test: /s/ Ida O. Creskoff
Clerk, United States Court of
Appeals for the Third Circuit.

[fol. 38]

[Clerk's Certificate to foregoing transcript omitted in printing.]

[fol. 39]

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1965

UNITED STATES, PETITIONER

vs.

STEPHEN ROBERT DEMKO

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—December 14, 1965

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 18, 1966.

/s/ William J. Brennan, Jr.
Associate Justice of the Supreme
Court of the United States

Dated this 14th day of December, 1965.

[fol. 40]

SUPREME COURT OF THE UNITED STATES

No. 1039, October Term, 1965

UNITED STATES, PETITIONER

v.

STEPHEN ROBERT DEMKO

ORDER ALLOWING CERTIORARI—April 4, 1966.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1966 216941 793

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

STEPHEN ROBERT DEMKO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on September 21, 1965.

OPINIONS BELOW

The United States District Court for the Western District of Pennsylvania did not render an opinion. The opinion of the court of appeals (App. A., *infra*, pp. 8–16) is reported at 350 F. 2d 698.

JURISDICTION

The judgment of the court of appeals (App. B., *infra*, p. 17) was entered on September 21, 1965. By order of Mr. Justice Brennan the time for filing a petition for a writ of certiorari was extended to and

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including February 18, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a federal prisoner eligible for workmen's compensation benefits under 18 U.S.C. 4126 because of injuries he incurred in the course of his assigned prison employment may sue the United States under the Federal Tort Claims Act to recover for such injuries.

STATUTE INVOLVED

The pertinent provisions of Section 4126 of Title 18, United States Code, are as follows:

> All moneys under the control of Federal Prison Industries, or received from the sale of the products or by-products of such Industries, or for the services of federal prisoners, shall be deposited or covered into the Treasury of the United States to the credit of the Prison Industries Fund and withdrawn therefrom only pursuant to accountable warrants or certificates of settlement issued by the General Accounting Office.
>
> * * * * *
>
> The corporation, in accordance with the laws generally applicable to the expenditures of the several departments and establishments of the government, is authorized to employ the fund, and any earnings that may accrue to the corporation, * * * in paying, under rules and regulations promulgated by the Attorney General, * * * compensation to inmates or their dependents for injuries suffered in any indus-

try or in any work activity in connection with the maintenance or operation of the institution where confined. In no event shall compensation be paid in a greater amount than that provided in the Federal Employees' Compensation Act.

STATEMENT

The facts are not disputed. In 1962, while an inmate of the federal penitentiary at Lewisburg, Pennsylvania, respondent was injured in the course of performing certain work required of him in connection with the maintenance of the prison.

Section 4126, *supra,* and regulations issued thereunder (28 C.F.R. § 301) provide for an award of workmen's compensation to federal prisoners injured in respondent's circumstances. Asserting that he was disabled as a result of those injuries, respondent applied for and was awarded such compensation in the amount of $180.00 per month.

After receipt of that award, respondent commenced this suit in 1963 under the Federal Tort Claims Act.[1] He sought additional recovery from the United States on the ground that the injuries he suffered in prison were the result of negligence on the part of federal prison officials. The district court rejected the only defense tendered—that respondent's right to workmen's compensation under 18 U.S.C. 4126 was his exclusive mode of redress against the United States—and, on July 13, 1964,

[1] 28 U.S.C. 1346(b), 2671, *et seq.*

entered a judgment of $20,000 in favor of respondent.[2]

The court of appeals affirmed, relying principally on *United States* v. *Muniz,* 374 U.S. 150, which had held that federal prisoners are not barred from bringing suit under the Tort Claims Act. Although neither prisoner involved in *Muniz* was eligible for compensation under 18 U.S.C. 4126 because neither was injured in the course of employment, the court of appeals read this Court's *Muniz* decision as establishing that a prisoner's right to sue under the Tort Claims Act would not be barred by the availability of a federal compensation remedy in the absence of express statutory language to that effect. The court below also rejected the government's argument, based on *Johansen* v. *United States,* 343 U.S. 427, and *Patterson* v. *United States,* 359 U.S. 495, that where Congress has made a remedy in the nature of workmen's compensation available to federal employees, that

[2] By stipulation filed with the district court, the parties agreed that respondent's injuries were proximately caused by the negligence of government employees and that $20,000, in addition to any compensation under 18 U.S.C. 4126 paid and payable to respondent, would be adequate compensation for the injuries sustained. The stipulation also provided that if the district court rejected the government's sole defense respondent was entitled to a judgment in the amount agreed upon, subject, however, to the government's right to seek further review of the question of whether respondent's right to compensation under 18 U.S.C. 4126 barred his suit under the Federal Tort Claims Act. It was further stipulated that respondent's "right to compensation pursuant to 18 U.S.C. 4126 is not affected by this suit. Regardless of the outcome of this suit [respondent] will have the same right to compensation as if suit had not been instituted."

remedy is presumed to be exclusive irrespective of an explicit statutory declaration to that effect..

Following the Third Circuit's decision in the instant case, the Second Circuit reached precisely the opposite result in *Granade* v. *United States* (No. 29,698, C.A. 2, decided February 9, 1966, App. C., *infra,* pp. 18–31), which affirmed a district court decison[3] restricting a federal prisoner injured at work in prison to his compensation remedy under 18 U.S.C. 4126. In its *Granade* opinion, the Second Circuit expressly noted and rejected the Third Circuit's conclusion that the prisoner compensation system was insufficiently comprehensive to justify the presumption that it was intended to be the exclusive means of redress against the government (App. C., *infra,* pp. 27*ff.*). The Second Circuit went on to rule (App. C., *infra,* p. 27):

> [T]he teaching of *Johansen* and *Patterson* has been consistently applied to foreclose suit under the Federal Tort Claims Act by federal employees who are eligible for benefits under federal compensatory schemes. We cannot believe that *Muniz* holds that, when federal employees are not allowed to pursue both remedies, federal prisoners may bring actions under the Federal Tort Claims Act even though they are also eligible for compensation benefits.
>
> We realize that our reading of *Muniz* is at variance with that of the Third Circuit in *Demko* v. *United States,* 350 F. 2d 698 (3 Cir. 1965), decided only a few months ago. It is our conclusion that the Third Circuit in *Demko*

[3] *Granade* v. *United States,* 237 F. Supp. 211 (S.D. N.Y.)

has misinterpreted the opinion of the Court in *Muniz,* and we do not adopt that interpretation.

REASONS FOR GRANTING THE WRIT

On the merits of the issue presented we are in full accord with the analysis and views of the Second Circuit expressed in *Granade* v. *United States,* reprinted *infra.* Because of the recurrent nature of the problem, indicated by the number of other suits raising the same issue presently pending in district courts in several circuits,[4] and in view of the direct conflict between the Second and Third Circuits on the question presented, we believe that review by this Court is plainly warranted.[5]

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[4] *Gonzales, et al.* v. *United States* (three plaintiffs), Civ. No. 150–Globe, D. Ariz.; *Gomez* v. *United States,* Civ. No. 8986, D. Colo.; *Cole* v. *United States,* Civ. No. 1560, N.D. Ga.; *Eidum* v. *United States,* Civ. No. 9564, N.D. Ga.; *Haithcock* v. *United States,* Civ. No. AC–1662, D. S.C.; *Aguilar* v. *United States,* Civ. No. 3326, W.D. Wash.; *Armstrong* v. *United States,* Civil No. 3354, W.D. Wash.; *Foster* v. *United States,* Civ. No. T–3875, D. Kans.; *Pfrimmer* v. *United States,* Civ. No. KC–2414, D. Kans.

[5] In the event that appellant in *Granade* v. *United States* petitions this Court for review of the decision of the Second Circuit, we would, of course, acquiesce in the grant of a writ of certiorari in that case.

CONCLUSION

For the reasons stated, the petition for certiorari in this case should be granted.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
JOHN W. DOUGLAS,
Assistant Attorney General.
MORTON HOLLANDER,
RICHARD S. SALZMAN,
Attorneys.

FEBRUARY 1966.

APPENDIX A

United States Court of Appeals for the Third Circuit

No. 15087

STEPHEN ROBERT DEMKO

v.

UNITED STATES OF AMERICA, APPELLANT

Appeal from the United States District Court for the Western District of Pennsylvania

Argued April 9, 1965

Before GANEY and FREEDMAN, *Circuit Judges,* and KIRKPATRICK, *District Judge*

OPINION OF THE COURT

(Filed September 21, 1965)

By FREEDMAN, *Circuit Judge:*

Plaintiff brought this suit under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671, *et seq.,* for damages for personal injuries sustained on March 12, 1962 while performing maintenance work which he was ordered to do as an inmate of the Federal Penitentiary at Lewisburg, Pennsylvania. On his release

from prison he was awarded compensation of $180 monthly from Federal Prison Industries, Inc., under 18 U.S.C. § 4126. He later brought this action, which the Government moved to dismiss on the ground that the compensation payments were his exclusive remedy. The motion to dismiss was denied.[1] The parties later entered into a stipulation in which the Government admitted its negligence, agreed that $20,000 in addition to the compensation already received and to be paid in the future would adequately compensate the plaintiff for his injuries, and that on the basis of the District Court's decision plaintiff was entitled to a judgment in the amount of $20,000. The stipulation reserved the Government's right to maintain its defense on appeal and provided that the plaintiff's right to compensation would not be affected by the present action. Pursuant to this stipulation judgment was entered in favor of the plaintiff and against the United States in the amount of $20,000. From this judgment the Government has appealed.

The question is whether § 4126 of Title 18 is plaintiff's exclusive remedy and bars the present action under the Federal Tort Claims Act.[2] Section 4126 provides that all moneys under the control of Federal Prison Industries or received from the sale of its

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[1] The motion was for summary judgment but the court below treated it as a motion to dismiss the complaint because no answer to the complaint had been filed, although the motion was accompanied by affidavits. Cf. Rule 12(b). In view of the subsequent judgment, this procedural detail need not be reviewed.

[2] The cases are divided. The Government's view prevailed in *Nobles* v. *Federal Prison Industries, Inc.*, 213 F. Supp. 731 (N.D. Ga. 1963); *Granade* v. *United States*, 237 F. Supp. 211 (S.D. N.Y. 1965), appeal pending. Plaintiff's view prevailed in *Gomez* v. *United States*, — F. Supp. — (D.C. Colo. 1965) (34 Law Week 2055 (July 27, 1965)).

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products or by-products or for the services of federal prisoners, shall be maintained in a Prison Industries Fund in the Treasury of the United States. The section also provides, in part, that the fund may be employed "in paying, under rules and regulations promulgated by the Attorney General, * * * compensation to inmates or their dependents for injuries suffered in any industry." In 1961 the section was amended by adding a provision for compensation for injuries suffered by inmates "in any work activity in connection with the maintenance or operation of the institution where confined."[3] The purpose of the amendment was to eliminate the discriminatory difference in treatment between prisoners employed in activities of Federal Prison Industries, who were afforded compensation for injuries, and prisoners working in various other institutional and maintenance operations, who were not entitled to compensation.[4]

In *United States v. Muniz,* 374 U.S. 150 (1963), the Supreme Court recently made it clear that claims against the United States for personal injuries sustained by inmates of federal prisons resulting from the negligence of government employees are within the Federal Tort Claims Act. The opinion was written by the Chief Justice for a unanimous Court. Its avowed purpose was to explore fully the intent of Congress in adopting the Federal Tort Claims Act, and it reviewed the effect of compensation benefits on the remedy afforded by the Act. It therefore points the way to our conclusion. The Court, after examining the circumstances surrounding the adoption of the Act, concluded that "it is clear that Congress in-

[3] Act of September 26, 1961, Pub. L. 87–317, 75 Stat. 681, 18 U.S.C. § 4126.

[4] Sen. Rep. No. 1056 (87th Cong., 1st Sess., 1961), reprinted at 2 U.S. Code Congr. and Admin. News, 1961, p. 3028.

tended to waive sovereign immunity in cases arising from prisoners' claims." (374 U.S., at 158). The Court rejected the Government's argument that an exception should be implied because of the requirements of prison discipline, and because of *Feres v. United States,* 340 U.S. 135 (1950), which held that the United States was not liable under the Act for injuries sustained by a member of the armed forces in the course of activity incident to his military service. Finding that the ultimate justification for the *Feres* decision was the necessity of maintaining military discipline, the Court declared that there was no such necessity in regard to prisoners, as was shown by the experience of those states which permitted suits by prisoners. But the Court also considered the language of *Feres* dealing with the effect of a compensation plan, saying: "* * * [T]he presence of a compensation system, persuasive in *Feres,* does not of necessity preclude a suit for negligence. * * * [T]he compensation system in effect for prisoners in 1946 was not comprehensive. It provided compensation only for injuries incurred while engaged in prison industries. Neither Winston nor Muniz [the respondents] would have been covered." (374 U.S., at 160). In a footnote the Court pointed out that even the broadened compensation coverage of prisoners provided by the amendment of 1961 failed to reach all prisoners, and added: "And, in any event, the compensation system still fails to provide for non-work injuries, contrary to that applicable to military personnel." (374 U.S., at 160, n. 17).

The Supreme Court's careful analysis of the intention of Congress in adopting the Federal Tort Claims Act in 1946 makes it clear that claims by prisoners for negligence fall within the Act and that this coverage is not to be cancelled whenever thereafter some

alteration is made in the provision of compensation for prisoners. If such compensation is intended to create either an election of remedies or an obliteration of the remedy for tort, it is to be expected that Congress will express such intention in the compensation statute, especially if it does not establish a full and comprehensive plan.

Congress in adopting the amendment of 1961 to § 4126 gave no express indication that the compensation authorized by it was to be exclusive, and its provisions preclude the imputation of any such intention. The compensation scheme for prisoners is very different from the compensation system for servicemen which was described in *Feres* as being "simple, certain, and uniform" (340 U.S., at 144) at the time the Federal Tort Claims Act was passed in 1946. It is also vastly different from the right to compensation enjoyed by government employees under the Federal Employees Compensation Act. It is permissive rather than mandatory. The amount of the award rests entirely within the discretion of the Attorney General,[5] but may not under the statute exceed the amount payable under the Federal Employees Compensation Act. Compensation is paid only upon the inmate's release from prison and will be denied if full recovery occurs while he is in custody and no significant disability remains after his release.[6] There is no provision for the claimant to have a personal physician present at his physical examination,[7] and there is no opportunity for administrative re-

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[6] Federal Prison Industries, Inc., Inmate Accident Compensation Regulations § 11, 28 C.F.R. §§ 301.1, 301.2.

[7] Compare Federal Employees Compensation Act, § 21, 5 U.S.C. § 771.

view.[8] Finally, compensation, even when granted, does not become a vested right, but is to be paid only so long as the claimant conducts himself in a lawful manner and may be immediately suspended upon conviction of any crime, or upon incarceration in a penal institution.[9]

What emerges on examination, therefore, is a severely restrictive system of compensation permeated at all levels by the very prison control and dominion which was at the origin of the inmate's injury. This discretionary and sketchy system of compensation, which would not even have covered the present plaintiff in 1946, may not be deemed the equivalent of compensation under the Federal Employees Compensation Act of 1916. Nowhere can there be found any indication that Congress intended that it should serve to exclude prisoners from the broad and sweeping policy embodied in the Federal Tort Claims Act.

The Government, however, argues that the *Muniz* case is not controlling here because the two prisoners involved in that case were not covered by any compensation plan, and that all that was said by the Court therefore was dicta. They urge that applicable here is the principle applied in *Johansen* v. *United States,* 343 U.S. 427 (1952),[10] reaffirmed in *Patterson* v. *United States,* 359 U.S. 495 (1959). In *Johansen* the petitioners were injured in the performance of their duties as seamen. They were concededly within the Federal Employees Compensation Act (5 U.S.C. §§ 751, *et seq.*). They sued, however, to recover dam-

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[10] Affirming *Johansen* v. *United States* 191 F. 2d 162 (2 Cir. 1951), and *Mandel* v. *United States*, 191 F. 2d 164 (3 Cir. 1951).

ages from the United States under the Public Vessels Act of 1925 (46 U.S.C. §§ 781, *et seq.*). The Court held that although the language of the Public Vessels Act appeared to permit such a suit, its central purpose as ascertained from its legislative history and the circumstances surrounding its enactment, led to the conclusion that Congress did not intend it to confer the right to sue on claimants who were entitled to the benefits of the Federal Employees Compensation Act. Among the reasons for the Court's conclusion was the fact that the Federal Employees Compensation Act covers all government employees, to whom it brought the benefits of the socially desirable rule that society should share with the injured employee the costs of accidents incurred in the course of employment: "All in all we are convinced that the Federal Employees Compensation Act is the exclusive remedy for civilian seamen on public vessels. As the Government has created a comprehensive system to award payments for injuries, it should not be held to have made exceptions to that system without specific legislation to that effect." (343 U.S., at 441.) [11]

Thus the essence of *Johansen* is that the Federal Employees Compensation Act is so comprehensive a system of coverage of all government employees that it is presumably intended to be their exclusive remedy.

The difference between the effect of general compensation available to government employees under the Federal Employees Compensation Act and that

[11] The 1949 amendment to the Federal Employees Compensation Act, which was passed after the Johansen case arose, expressly made the Act exclusive of other remedies against the United States.

of compensation plans dealing with special circumstances, on rights under the Federal Tort Claims Act is illustrated by *United States* v. *Brown,* 348 U.S. 110 (1954). It was there held that a veteran could maintain an action under the Federal Tort Claims Act for damages for negligent medical treatment in a Veterans Administration hospital aggravating a service-connected injury, even though he had received additional compensation because of the aggravation, since Congress had given no indication that the right of veterans to compensation was an exclusive remedy. Johansen was distinguished as involving a general workmen's compensation plan.[12]

The limited and discretionary compensation scheme provided by § 4126 is not comparable to the system of compensation provided for government employees by the Federal Employees Compensation Act. Limited as it is in both the scope of its coverage and the relief it extends, it is not such a broad and general system of compensation that it may be deemed impliedly to express a congressional intention to except federal prisoners injured in the course of their work as inmates from the remedial protection afforded by the Federal Tort Claims Act. The Act, as the Supreme Court has said, "provides much-needed relief to those suffering injury from the negligence of government employees. We should not, at the same time that state courts are striving to mitigate the hardships caused by sovereign immunity, narrow the remedies

[12] Similarly, *Brooks* v. *United States,* 337 U.S. 49 (1949), holding that servicemen who recovered compensation for injuries were not barred from suing under the Federal Tort Claims Act if the injuries were sustained while on furlough. See also Annotation, 84 A.L.R.2d 1059.

provided by Congress." *United States* v. *Muniz*, 374 U.S. 150, 165–66 (1963).

The judgment therefore will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B

United States Court of Appeals for the Third Circuit

No. 15,087

STEPHEN ROBERT DEMKO
v.
UNITED STATES OF AMERICA, APPELLANT

(D.C. Civil No. 63–803)

On Appeal from the United States District Court For the Western District of Pennsylvania

Present: GANEY and FREEDMAN, *Circuit Judges,* and KIRKPATRICK, *District Judge*

JUDGMENT

This case came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the District Court, filed July 14, 1964, be, and the same is hereby affirmed, with costs.

Attest:

IDA O. CRESKOFF,
Clerk.

SEPTEMBER 21, 1965.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 32—September Term, 1965

(Argued October 4, 1965 Decided February 9, 1966)

Docket No. 29698

LOUIS H. GRANADE, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Before WATERMAN, HAYS and ANDERSON,
Circuit Judges

Appellant, alleging injury while in federal custody as a prisoner, sought recovery under the Federal Tort Claims Act after his release by commencing suit against the United States in the United States District Court for the Southern District of New York. The Government moved for summary judgment which was granted with prejudice, Palmieri, *J.* Affirmed.

PARNELL J. T. CALLAHAN (Joseph J. Strelkoff, of counsel), New York City, *for Plaintiff-Appellant.*

RICHARD S. SALZMAN, Atty., Dept. of Justice; John W. Douglas, Asst. Atty. Gen.; Robert M. Morgenthau, U.S. Atty.; Alan S. Rosenthal, Atty., Dept. of Justice, *for Defendant-Appellee.*

WATERMAN, *Circuit Judge:*

The plaintiff-appellant, Louis Granade, commenced this suit in the United States District Court for the Southern District of New York seeking to recover damages under the Federal Tort Claims Act,[1] for personal injuries he allegedly received while confined in the Federal House of Detention in New York City awaiting sentence on a criminal charge to which he had entered a plea of guilty.

Appellant alleges that on September 13, 1962 he was assigned to operate the prison public address system. To perform this task he was obliged to sit at a table located directly underneath a shelf on which rested an emergency light. The light was not securely fastened to the shelf and while he was at work a door was slammed causing the light to topple forward and strike him on the head and the right hand. He alleges that the various injuries he sustained from this accident were caused solely by the negligence of the defendant United States and its employees.

The present suit was commenced in May 1964, prior to the appellant's release from prison.[2] In the

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[1] Chapter 753, 60 Stat. 842 (1946) (codified in scattered sections of Title 28 of the United States Code).

[2] Appellant was discharged from prison on January 4, 1965. In an administrative proceeding unrelated to the present case, he sought accident compensation for a disability continuing after his discharge. See Inmate Accident Compensation Regu-

fall of that year the Government moved for summary judgment pursuant to Fed. R. Civ. P. 56 for failure to state a claim upon which relief could be granted. It pointed out that at the time of appellant's alleged injury he was lawfully in federal custody performing assigned work activities in a federal penal institution, and that Congress had made available a remedy in the nature of workmen's compensation for injuries incurred under these circumstances. See 18 U.S.C. § 4126. It argued that appellant's suit should be dismissed because the compensation system for federal prisoners injured in the course of performing duties assigned them in connection with the operation of a federal penal institution was appellant's exclusive remedy.

On January 25, 1965 the district court granted the Government's motion for summary judgment. In support of this result the lower court first observed it was "undisputed that the plaintiff's injury is compensable under 18 U.S.C. § 4126 * * *" *Granade* v. *United States,* 237 F. Supp. 211, 212 (S.D.N.Y. 1965). The lower court went on to rule that:

> The entire statutory scheme of remedies against the Government is based on the principle that where there is a remedy available in the form of a compensation system, there is no concurrent right to sue under the Federal Tort Claims Act. *Ibid.*

Granade's appeal from this order presents us with the narrow but important question whether the dis-

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lations, 28 C.F.R. § 301.2 (1959). The Accident Compensation Committee, which administers the compensation program, rejected appellant's claim for compensation benefits "based on medical evidence that any disability you now have is not related to any injury [sustained in prison]." There is no formal provision made for an administrative review of a denial of a compensation claim. And the correctness of this administrative determination is not at issue in this judicial proceeding.

trict court erred in ruling that compensation for plaintiff-appellant's injury under 18 U.S.C. § 4126 is his exclusive remedy against the United States.

I

Appellant draws our attention to the fact that 18 U.S.C. § 4126, the statutory authorization for a system of federal prisoner compensation, contains no explicit indication that Congress intended this compensation system to be the exclusive remedy for prisoners injured while performing duties related to the operation of a federal penal institution. Appellant further notes, with equal accuracy, that the Federal Tort Claims Act does not in terms bar suit by prisoners for injuries also compensable under the federal scheme of prisoner compensation.[3] Since both statutes are silent on this crucial point, appellant argues that we should permit him to bring this present suit grounded upon the Federal Tort Claims Act.[4]

In so arguing we believe appellant would have us overlook a principle of construction to which courts invariably advert when they attempt to fit disparate types of statutory remedies against the federal government into a "workable, consistent and equitable whole." *Feres* v. *United States,* 340 U.S. 135, 139 (1950). The principle can be put quite simply: When Congress has established a scheme of compensation to provide a remedy for personal injuries suffered in the course of federal employment, the com-

[3] *United States* v. *Muniz*, 374 U.S. 150 (1963), held that an inmate of a federal prison, claiming injury as a result of the negligence of prison officials, is not barred from suing the United States under the Tort Claims Act simply by reason of his status as a prisoner.

[4] Indeed, appellant urges that the decision of the Court in *United States* v. *Muniz*, *supra* note 3, requires us to allow this suit to proceed. See *infra* point II.

pensation system is presumed to be the exclusive means of redress against the government for all persons eligible for the system's benefits, even if Congress has not stated that the compensation scheme should be exclusive.

This resilient principle of construction was clearly articulated in *Johansen* v. *United States,* 343 U.S. 427 (1952), a case involving a civilian injured while employed on a United States Army transport vessel. As a civil service employee Johansen was concededly eligible to receive benefits under the Federal Employees' Compensation Act of 1916.[5] However, at the time of Johansen's injury the Act did not provide that it was the exclusive remedy against the federal government. Johansen elected to sue the Government under the Public Vessels Act of 1925.[6] No provision in the Public Vessels Act explicitly precluded suit by persons entitled to benefits under the Federal Employees' Compensation Act. In this setting the Supreme Court held that in passing the Federal Employees' Compensation Act Congress presumably intended it to be the exclusive remedy for those injured employees who came within its coverage. After exhaustively examining the rather inconclusive legislative history of the two federal acts the Court concluded in *Johansen* that when the "Government has created a comprehensive system to award payments for injuries, it should not be held to have made exceptions to that system without specific legislation to that effect." 343 U.S. at 441. Seven years later in *Patterson* v. *United States,* 359 U.S. 495 (1959) the Court declined to reconsider the teaching of *Johansen.* And it would now seem to be well settled that if a remedy is available under the Federal Employees'

[5] 5 U.S.C. §§ 751–94.
[6] 46 U.S.C. §§ 781–90.

Compensation Act for injuries sustained in the course of employment, this remedy is exclusive, and no concurrent remedy exists under the Federal Tort Claims Act, the Jones Act, the Suits in Admiralty Act, or the Public Vessels Act. *Jarvis* v. *United States,* 342 F. 2d 799 (5 Cir.), *cert. denied,* 86 Sup. Ct. 70 (1965); *Somma* v. *United States,* 283 F. 2d 149 (3 Cir. 1960); *Mills* v. *Panama Canal Co.,* 272 F. 2d 37 (2 Cir. 1959), *cert. denied,* 362 U.S. 961 (1960).

This same principle of construction is also regularly applied in tort liability suits brought against the federal government by persons eligible for benefits under federal compensatory schemes other than the Federal Employees' Compensation Act, even though these other compensation schemes also lack explicit indication that Congress intended them to be exclusive. See *United States* v. *Forfari,* 268 F. 2d 29 (9 Cir.), *cert. denied,* 361 U.S. 902 (1959); *Aubrey* v. *United States,* 254 F. 2d 768 (D.C. Cir. 1958); *Lewis* v. *United States,* 190 F. 2d 22 (D.C. Cir.), *cert. denied,* 342 U.S. 869 (1951).

In view of the unanimity with which courts have announced that injured persons entitled to receive benefits under a federal compensation scheme must look exclusively to that scheme for redress, we would be inclined to apply the principle in the present case even if the principle were logically unsupportable. Fortunately, however, the policy underlying the principle is both apparent and quite sensible. Courts hold that federal compensation acts, when applicable, are presumably intended to afford an exclusive remedy on the ground that this is one aspect of a *quid pro quo* whereby the federal government assumes a liability irrespective of fault and in return is relieved of the prospect of suffering large damage verdicts. See 2 Larson, *Workmen's Compensation Law* § 65.10

(1961). Of course, we recognize that Congress can legislate otherwise; but in the absence of evidence as to congressional intent to do so, it seems most sensible to presume that when Congress provides a system of simple, certain, and uniform benefits it intends this system to be the exclusive means of redress for all those who come within its scope.

The foregoing discussion inclines us toward the application of this "exclusive remedy" principle in the present case and thus affirmance of the district court's grant of the Government's motion for summary judgment; appellant, however, advances two separate arguments that the principle is inapplicable here and urges that these contentions compel us to reverse the district court.

II

Appellant first urges that in *United States* v. *Muniz*, 374 U.S. 150 (1963) the Supreme Court made it clear that claims against the United States for personal injuries sustained by inmates of federal prisons resulting from the negligence of government employees are within the Federal Tort Claims Act, even though the injuries are also compensable under Section 4126. To support this view of *Muniz* appellant points to the Court's statement in that case that in suits by prisoners brought under the Federal Tort Claims Act, as the suits there involved had been, "the presence of a compensation system * * * does not of necessity preclude a suit for negligence." 374 U.S. at 160. Viewed, however, in context, the quoted language fails to support appellant's position. *Muniz* disposed of appeals in two separate suits commenced by prisoners in the Southern District of New York. In both cases the district court had granted the Government's motion to dismiss on the ground that

prisoners by reason of their status as prisoners could not sue under the Federal Tort Claims Act. Our court, siting *in banc,* reversed, four judges dissenting. 305 F. 2d 264; 305 F. 2d. 287.

Before the *in banc* court the Government argued that the lower court should be affirmed because, *inter alia,* the existence of a prisoner's compensation scheme was indicative of a congressional intent to foreclose suit by prisoners under the Federal Tort Claims Act. Rejecting this argument we noted that the applicable system of prisoner compensation covered "only a very small portion of the injuries that are sustained by federal prisoners * * *" 305 F. 2d at 269,[7] and we recognized that neither of the two prisoner-appellants was eligible for compensation under the system. We went on to conclude that a prisoner compensation system of such limited scope could not with reason be said to bar suit under the Federal Tort Claims Act by prisoners who concededly were not included within the system and hence were not eligible for compensation benefits. We believe the

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[7] Prior to 1961 the federal system of prisoner compensation provided benefits only for prisoners working for Federal Prison Industries, Inc. Only twenty percent of all federal prisoners were so engaged. See *United States* v. *Muniz*, 374 U.S. at 160, n. 17. In 1961 the program was expanded in order to eliminate the difference in treatment between prisoners employed in activities of Federal Prison Industries, Inc., who were afforded compensation for their injuries, and prisoners working in various other institutional operations who were not entitled to compensation. Act of September 26, 1961, Pub. L. 87-317, 75 Stat. 681, 18 U.S.C. § 4126. See S. Rep. No. 1056, 87th Cong., 1st Sess. (1961). Both prisoners injured in *Muniz* were injured prior to the 1961 expansion of coverage. And both were ineligible for benefits under the pre-1961 system. They would also have been ineligible under the post-1961 system because neither suffered injury while doing work connected with the maintenance of a penal institution.

Supreme Court's language to which appellant points means only that prisoners like Muniz, who are ineligible for compensation benefits, are not foreclosed from commencing tort suits against the Government when a scheme exists that provides compensation benefits to certain other prisoners. So understood *Muniz* does not support the present appellant's position because appellant was concededly eligible for benefits under 18 U.S.C. § 4126.

There are further grounds supporting our conclusion that *Muniz* did not hold that prisoners eligible for Section 4126 compensation benefits may also sue for damages under the Federal Tort Claims Act. First, the Court in *Muniz* stated that it had granted certiorari to resolve a conflict between the circuits on the issue whether federal prisoners were, solely by reason of their status as prisoners, disqualified from suit under the Federal Tort Claims Act. In none of the conflicting cases referred to by the Court were the prisoners who sought relief under the Federal Tort Claims Act eligible for federal compensation benefits.[8] Second, in *Muniz* the Court made no attempt to deal with the general teaching of cases as *Johansen* and *Patterson, supra.* This lack of comment was due, we believe, to the fact that the issue whether an individual eligible for federal compensation benefits may also sue under the Federal Tort Claims Act was not before the Court in *Muniz.* In these circumstances we think it highly unlikely that the Court's

[8] Neither of the prisoners involved in *Muniz* were eligible for federal compensation benefits. See note 7 *supra.* This was also true of the federal prisoners involved in the conflicting Seventh and Eighth Circuit cases mentioned by the Court. *James* v. *United States*, 280 F. 2d 428 (8 Cir.), *cert. denied*, 364 U.S. 845 (1960); *Lack* v. *United States*, 262 F. 2d 167 (8 Cir. 1958); *Jones* v. *United States*, 249 F. 2d 864 (7 Cir. 1957).

language in *Muniz* to which appellant points was designed *sub silentio* to overrule the carefully considered position the Court had previously announced in *Johansen* and had reaffirmed in *Patterson*. Third, as we have noted earlier, the teaching of *Johansen* and *Patterson* has been consistently applied to foreclose suit under the Federal Tort Claims Act by federal employees who are eligible for benefits under federal compensatory schemes. We cannot believe that *Muniz* holds that, when federal employees are not allowed to pursue both remedies, federal prisoners may bring actions under the Federal Tort Claims Act even though they are also eligible for compensation benefits.

We realize that our reading of *Muniz* is at variance with that of the Third Circuit in *Demko* v. *United States*, 350 F. 2d 698 (3 Cir. 1965), decided only a few months ago.[9] It is our conclusion that the Third Circuit in *Demko* has misinterpreted the opinion of the Court in *Muniz*, and we do not adopt that interpretation.

III

Appellant also urges that 8 U.S.C. § 4126 should not be presumed to be the exclusive means of redress against the Government for those individuals within its scope because Section 4126 "is not a comprehensive compensation program." The Third Circuit's decision in *Demko* was bottomed in part on that court's conclusion that the compensation program for prisoners was "discretionary and sketchy." 350 F. 2d at 701. We believe, to the contrary, that the prisoner compensation program under consideration is sufficiently comprehensive to justify our holding that

[9] *Demko* was decided on September 21, 1965, after the decision of the district court in the present case had been filed but before we heard oral argument on the appeal.

it is appellant's exclusive means of redress against the Government.

Section 4126 states that all moneys under the control of Federal Prison Industries or received from the sale of its products or by-products or the services of federal prisoners, shall be maintained in a Prison Industries Fund in the United States Treasury. The section goes on to state that Federal Prison Industries is authorized *inter alia* "to employ the fund * * * in paying, under rules and regulations promulgated by the Attorney General * * * compensation to inmates or their dependents for injuries suffered in any industry or in any work activity in connection with the maintenance or operation of the institution where confined." 18 U.S.C. § 4126. True, Section 4126 does not explicitly require that such a compensation system be established, neither does the section specify a certain mode of operation; nevertheless a compensation scheme has been established and embodied in regulations.[10] This system of compensation does not become less than comprehensive simply because the details of the system are spelled out in regulations rather than in the authorizing statute.[11] And

[10] See Inmate Accident Compensation Regulations, 28 C.F.R. § 301.1–.10 (1959). A comprehensive exegesis of these regulations is distributed to federal prisoners in pamphlet form. Federal Prison Industries, Inc., *Inmate Accident Compensation Regulations* (1962) [hereinafter *Inmate Compensation Pamphlet*]. This pamphlet is set out in full in the appendix to the Government's brief in the present case. The provisions of 28 C.F.R. § 301.1–.10 (1959) do not seem to conflict with the more comprehensive statement of the prisoner compensation system set forth in the *Inmate Compensation Pamphlet*. Certainly no conflict exists that is relevant to the present case.

[11] At least one other federal compensation system has been construed to provide the exclusive remedy for those within its terms even though the authorizing statute was not significantly more detailed than is Section 4126. Prior to its amendment

an examination of the regulations makes it quite clear that an award of compensation under Section 4126 is not discretionary but is mandatory as to any claim that comes within their terms.

Appellant nevertheless contends that the system of compensation is less than comprehensive because compensation is paid only upon the inmate's release from penal custody and is denied if full recovery has occurred before the date of release. This argument is in part simply incorrect; prisoners injured while performing paid prison jobs continue to receive full pay while disabled (after a short waiting period) even though they are in prison.[12] It is true that prisoners injured while performing jobs for which no pay is received do not receive compensation benefits until they are released from prison and then only if full recovery has not occurred. However, inasmuch as such prisoners have experienced no loss of earnings, and have received food, clothing, shelter, and medical attention during the period of their in-

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in 1958 Section 150k–1 of Title 5 required only that certain military establishments operating on nonappropriated funds—self-supporting cafeterias and officers' messes—"provide their civilian employees, by insurance or otherwise, with compensation for death or disability incurred in the course of employment." Ch. 444, § 2, 66 Stat. 139 (1952) (now § 1, 72 Stat. 397 (1958), 5 U.S.C. § 150k–1). It is true that the pre-1958 statute went on to provide that compensation shall not be less than that provided in the state where the workers are employed; nevertheless, with this exception, old Section 150k–1 was no more detailed than is Section 4126. Yet the cases uniformly hold that old Section 150k–1 provided an exclusive remedy. See *Rizzuto* v. *United States*, 298 F. 2d 748 (10 Cir. 1961); *Lowe* v. *United States*, 292 F. 2d 501 (5 Cir. 1961), *affirming*, 185 F. Supp. 189 (D. Miss. 1960); *United States* v. *Forfari*, 268 F. 2d 29 (9 Cir.), *cert. denied*, 361 U.S. 902 (1959); *Aubrey* v. *United States*, 254 F. 2d 768 (D.C. Cir. 1958).

[12] Section 301.1, 28 C.F.R. (1959); § 11 *Inmate Compensation Pamphlet.*

carceration, we find nothing untoward in this result.

Appellant also maintains that the compensation program for prisoners is less than comprehensive because it "does not compensate a prisoner for any * * * pain and suffering which he may endure while in prison." This is admittedly so. However, the theory of workmen's compensation legislation is that in return for a guaranteed recovery only those items of damage that adversely affect earning power are compensable. See *Sweeting* v. *American Knife Co.*, 226 N.Y. 199, 123 N.E. 82, *aff'd sub nom. New York Cent. R.R. Co.* v. *Bianc*, 250 U.S. 596 (1919); 1 Larson, *Workmen's Compensation Law* § 2.40 (1961). Therefore, though appellant while in prison may have experienced pain and suffering due to his work-related injury for which he has received no compensation, that has no bearing on whether § 4126 should be considered an exclusive remedy. What is relevant is whether this section and the related regulations afford all the benefits usually provided by workmen's compensation legislation, and in our judgment they do. The regulations adopted pursuant to Section 4126 provide all necessary medical, surgical, and hospital services whether required during incarceration or after discharge.[13] If disability persists beyond release inmates are accorded monthly compensation benefits based on the provisions of the Federal Employees' Compensation Act.[14] The right to such compensation is not dependent upon evidence of fault or negligence on the part of the Government; nor is it defeated by the prisoner's own contributory negligence, although, in common with the Federal

[13] Section 301.8, 28 C.F.R. (1959); §§ 2, 17 *Inmate Compensation Pamphlet.*

[14] Section 301.2, 28 C.F.R. (1959); §§ 12, 13 *Inmate Compensation Pamphlet.*

Employees' Compensation Act,[15] benefits are not payable for injuries caused by the willful misconduct of the prisoner.[16]

We conclude that the district court's grant of appellee's motion for summary judgment should be affirmed on the ground that appellant's injuries were compensable under the system of prisoner compensation established pursuant to 18 U.S.C. § 4126 and therefore he may not maintain this action under the Federal Tort Claims Act.

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[15] 5. U.S.C. § 751(a).

[16] 301.4, 28 C.F.R. (1959); § 10 *Inmate Compensation Pamphlet.* In *Demko* v. *United States*, 350 F. 2d 698 (3 Cir. 1965), it was also suggested that the prisoner compensation program was less than comprehensive because the regulations contained no provision for a claimant seeking compensation benefits to have a personal physician present at his physical examination. As we understand the operation of this program, nothing prevents an ex-prisoner from accompanying his claim for benefits with the examination report of his own physician. The Third Circuit also observed that there is no formal provision for administrative review of the Accident Compensation Committee's decision. Although this observation is correct, we do not believe it warrants a holding that 18 U.S.C. § 4126 is not the exclusive remedy for those who come within its terms. The lack of judicial review of final compensation orders has never been thought grounds for holding that a particular compensation system is other than exclusive. See, e.g., *Blanc* v. *United States*, 244 F. 2d 708 (2 Cir.), *cert. denied*, 355 U.S. 874 (1957).

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 76

UNITED STATES OF AMERICA, PETITIONER

v.

STEPHEN ROBERT DEMKO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The United States District Court for the Western District of Pennsylvania did not render an opinion. The opinion of the court of appeals (R. 25–31) is reported at 350 F. 2d 698.

JURISDICTION

The judgment of the court of appeals was entered on September 21, 1965 (R. 33). On December 14, 1965, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including February 18, 1966 (R. 35). The petition was filed on February 17, 1966, and was granted on April 4,

1966 (383 U.S. 966). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a federal prisoner eligible for workmen's compensation benefits from the United States under 18 U.S.C. 4126 because of injuries incurred in the course of his assigned prison employment has an additional remedy against the United States under the Federal Tort Claims Act to recover for such injuries.

STATUTE INVOLVED

The pertinent provisions of 18 U.S.C. 4126 are as follows:

> All moneys under the control of Federal Prison Industries, or received from the sale of the products or by-products of such Industries, or for the services of federal prisoners, shall be deposited or covered into the Treasury of the United States to the credit of the Prison Industries Fund and withdrawn therefrom only pursuant to accountable warrants or certificates of settlement issued by the General Accounting Office.
>
> * * * * * *
>
> The corporation, in accordance with the laws generally applicable to the expenditures of the several departments and establishments of the government, is authorized to employ the fund, and any earnings that may accrue to the corporation, * * * in paying, under rules and regulations promulgated by the Attorney General, * * * compensation to inmates or their dependents for injuries suffered in any industry

or in any work activity in connection with the maintenance or operation of the institution where confined. In no event shall compensation be paid in a greater amount than that provided in the Federal Employees' Compensation Act.

STATEMENT

In 1962 respondent was an inmate of the federal penitentiary at Lewisburg, Pennsylvania, where he was required to do work in connection with the maintenance of the prison. He was injured in the performance of an assigned prison task.

Under 18 U.S.C. 4126, Congress has authorized the payment of workmen's compensation benefits "to inmates or their dependents for injuries suffered in any [prison] industry or in any work activity in connection with the maintenance or operation of the institution where confined." Such payments are to be made in accordance with "rules and regulations promulgated by the Attorney General."[1] Pursuant to those regulations,[2] respondent filed a formal claim for an award of compensation benefits on account of the injuries he had received. After his claim of

[1] The regulations governing awards of workmen's compensation to federal prisons were initially promulgated in 1937, 40 C.F.R. §§ 1.1–1.10 (1st ed. 1939), and now appear, unchanged, at 28 C.F.R. §§ 301.1–301.10 (1966 Rev.). For the benefit of the inmates, in 1962 a comprehensive explanation of the regulations was prepared and distributed in a pamphlet entitled "Inmate Accident Compensation Regulations." That pamphlet was referred to by the courts below and is included in the record (R. 13–19). See *Granade* v. *United States*, 356 F. 2d 837, 843, n. 10 (C.A. 2).

[2] 28 C.F.R. § 301.7; Compensation Pamphlet, ¶¶ 5, 6.

physical disability from that accident was verified by a medical examination[3] and approved by the designated officials in Washington, D.C.,[4] respondent was awarded $180.00 per month in compensation benefits under 18 U.S.C. 4126 (R. 6–8).[5] Those benefits were payable commencing the first of the month following his release from prison and will continue to be paid so long as his disability persists.[6] Prior to his discharge, respondent was afforded necessary medical, surgical and hospital care without charge.[7] The cost of any future medical attention required for the injuries respondent incurred in prison will similarly be borne by the government under the Inmate Compensation program.[8]

In 1963 respondent commenced this suit under the Federal Tort Claims Act[9] to recover damages from the United States for the injuries that were the basis of the compensation award, on the ground that they were the result of negligence on the part of federal

[3] Compensation Pamphlet, ¶ 5.

[4] Compensation Pamphlet, ¶ 6.

[5] 18 U.S.C. 4126 provides that: "In no event shall compensation be paid in a greater amount than that provided in the Federal Employees' Compensation Act." At the time of the award in suit, that Act (5 U.S.C. (1964 ed.) 756(c)) fixed $180.00 per month as the minimum award to a federal employee who suffered a permanent or temporary total disability in the course of his government employment.

[6] 28 C.F.R. § 301.2. Had respondent been injured while engaged in a paid prison work assignment, he would have continued to be paid his wages while he was disabled so long as he remained in prison. 28 C.F.R. § 301.1.

[7] Compensation Pamphlet, ¶ 2.

[8] 28 C.F.R. § 301.8.

[9] 28 U.S.C. 1346(b), 2671 *ff.*

prison officials. The district court rejected the sole defense tendered by the government—that respondent's right to workmen's compensation benefits under 18 U.S.C. 4126 was his exclusive remedy and precluded recovery under the Federal Tort Claims Act (R. 10–11). The parties then entered into a stipulation which admitted the negligence of government employees, agreed that $20,000 in addition to present and future compensation benefits would adequately compensate respondent for his injuries, and provided that respondent was entitled to a judgment awarding that sum in view of the district court's rejection of the government's sole defense. The stipulation preserved, however, the government's right to litigate on appeal the issue of the exclusiveness of the compensation remedy (R. 11–12).[10] Based on that stipulation the district court entered a judgment of $20,000 in favor of respondent on July 13, 1964 (R. 13).

On April 9, 1965, the court of appeals affirmed (R. 25), relying principally on *United States* v. *Muniz,* 374 U.S. 150, which held that an individual's status as a federal prisoner did not in itself bar him from bringing suit under the Federal Tort Claims Act. Although neither prisoner involved in *Muniz* was eligible for compensation benefits under 18 U.S.C. 4126 because neither was injured in the course of employment, the Third Circuit read this Court's *Muniz*

[10] The stipulation further provided that respondent's "right to compensation pursuant to 18 U.S.C. 4126 is not affected by this suit. Regardless of the outcome of this suit the plaintiff will have the same right to compensation as if suit had not been instituted" (R. 12).

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decision as establishing that a federal prisoner's right to sue would not be barred by the availability of a federal compensation remedy in the absence of express statutory language to that effect (R. 27–28). The court below rejected the government's argument, based on *Johansen* v. *United States,* 343 U.S. 427, and *Patterson* v. *United States,* 359 U.S. 495, that where Congress has authorized a remedy in the nature of workmen's compensation, such remedy is presumed to be exclusive even without an explicit statutory declaration to that effect. In the Third Circuit's view, the compensation remedy established under 18 U.S.C. 4126 was not a sufficiently "comprehensive" system to warrant the presumption that it was intended to be exclusive.

Following the Third Circuit's decision in the case at bar, the Second Circuit, on February 9, 1966, reached precisely the opposite result in *Granade* v. *United States,* 356 F. 2d 837,[11] holding a federal inmate injured in prison employment to be restricted to redress under 18 U.S.C. 4126 for such injuries. After observing that the question of a dual tort-compensation remedy for prisoners had not been before this Court in *Muniz,* the Second Circuit stated (356 F. 2d at 842):

> [T]he teaching of *Johansen* and *Patterson* has been consistently applied to foreclose suit under

[11] Petition for certiorari filed May 9, 1966 (No. 172 Misc., Oct. Term, 1966). In a responsive memorandum filed on May 18, 1966, the Solicitor General indicated that, although regarding the decision of the Second Circuit in *Granade* as correct, he would not oppose the grant of certiorari in view of the pendency of the present case.

> the Federal Tort Claims Act by federal employees who are eligible for benefits under federal compensation schemes. We cannot believe that *Muniz* holds that, when federal employees are not allowed to pursue both remedies, federal prisoners may bring actions under the Federal Tort Claims Act even though they are also eligible for compensation benefits.

The Second Circuit also noted and rejected the Third Circuit's conclusion that the prisoner compensation system was not sufficiently comprehensive to justify the normal presumption that Congress intended it to be the exclusive remedy against the government. 356 F. 2d 842–844.

SUMMARY OF ARGUMENT

I

Workmen's compensation legislation has been widely adopted as a desirable substitute for the common law negligence action for injuries received at work. In place of the delays, uncertainties and legal expenses of tort litigation, compensation remedies provide injured workmen with a guarantee against sudden loss of income without regard to questions of fault or contributory negligence. And, where adopted, compensation has been recognized as the exclusive remedy for injuries within its coverage. The general rule of exclusivity has been held by this Court to warrant a presumption of legislative intent in relating federal compensation statutes to other remedies against the government. *Johansen* v. *United States,* 343 U.S. 427; *Patterson* v. *United States,* 359 U.S.

495. The courts of appeals have applied that exclusivity rule uniformly, not only with respect to the Federal Employees' Compensation Act involved in *Johansen* and *Patterson,* but to all similar federal legislation protecting employees not covered by the Compensation Act. See, *e.g., United States* v. *Forfari,* 268 F. 2d 29 (C.A. 9), certiorari denied, 361 U.S. 902; *Aubrey* v. *United States,* 254 F. 2d 768 (C.A.D.C.); *Lowe* v. *United States,* 292 F. 2d 501 (C.A. 5); *Lewis* v. *United States,* 190 F. 2d 22 (C.A.D.C.), certiorari denied, 342 U.S. 869. Since all other compensation remedies provided by the federal government for employees injured at work have been construed to be exclusive of other relief, there is no rational basis for carving out an exception to that rule for the sole benefit of federal prisoners.

II

The court of appeals erred in assuming that, had Congress intended the workmen's compensation remedy for federal prisoners under 18 U.S.C. 4126 to be exclusive, it would have provided so expressly. First, in *Johansen* and *Patterson* this Court found compensation remedies to be exclusive even absent a congressional declaration to that effect. Second, workmen's compensation for prisoners was first authorized in 1934, long before any tort remedy was available. As the Court noted in *Johansen* (343 U.S. 427, 433) the absence of any assertion of exclusivity in the Federal Employees' Compensation Act of 1916 was an "understandable" omission since, when the statute was enacted it was the only, and therefore the exclusive,

remedy available against the United States. Third, when 18 U.S.C. 4126 was expanded in 1961 to encompass all work injuries, not merely those incurred by employees of prison industries, the lower federal courts had uniformly held that prisoners had no remedy under the Federal Tort Claims Act of 1946. It was not until 1963 that this Court finally held to the contrary in *United States* v. *Muniz,* 374 U.S. 150. The legislative history of the 1961 amendment of Section 4126 makes clear that Congress assumed it was affording a remedy in an area where none existed. In short, nothing in the background of 18 U.S.C. 4126 indicates any congressional intent to depart from "the principle of the exclusive character of federal plans for compensation" affirmed by the court in *Johansen* v. *United States,* 343 U.S. at 440, and *Patterson* v. *United States,* 359 U.S. 495.

III

There is nothing in *United States* v. *Muniz,* 374 U.S. 150, to warrant a contrary conclusion. Neither of the two prisoners whose suits under the Federal Tort Claims Act were upheld in *Muniz* was eligible for compensation under Section 4126 since in neither case were the alleged injuries work-connected. Thus the exclusivity of Section 4126 as a remedy for injuries within its coverage was neither presented nor decided in *Muniz.* The Court did not purport to reconsider the rule laid down in *Johansen* v. *United States,* 343 U.S. 427, and reaffirmed in *Patterson* v. *United States,* 359 U.S. 495.

Relying on language in *Muniz,* the court below found that the system of compensation for prisoners was

not sufficiently comprehensive to be deemed exclusive even for claims within its coverage. It seems doubtful that comprehensiveness has any relevance in determining the exclusivity of compensation as a remedy for injuries which are undeniably comprehended. But in any event the court of appeals was mistaken in its appraisal of the system of compensation established under Section 4126. That system is not distinguishable from typical workmen's compensation systems in terms of breadth of coverage, measure of benefits provided or other essential features. The court below erred, therefore, in failing to recognize that, like other compensation systems, Section 4126 affords an exclusive remedy.

ARGUMENT

INTRODUCTION

The judgment below permits a federal prisoner eligible for workmen's compensation benefits from the United States for injuries incurred in prison employment to seek additional recovery from the United States by means of a suit in tort. That decision departs from settled law in two important respects: *First,* it ascribes to Congress the intent to afford a greater remedy to prisoners than to any other class of federal employees (the latter being limited to administrative compensation benefits as their exclusive remedy against the United States for work-connected injuries); *second,* it contravenes the cardinal principle of workmen's compensation legislation—that the obligation to provide compensation benefits without regard to fault or contributory negligence is in lieu of,

and not in addition to, tort liability for injuries within the coverage of the compensation program. In concluding that Congress intended to provide a unique and additional remedy for federal prisoners, we submit that the court below erred.

I

THE COURT OF APPEALS DISREGARDED THE ESTABLISHED PRINCIPLE THAT, WITHIN THE SCOPE OF THEIR COVERAGE, FEDERAL COMPENSATION REMEDIES ARE PRESUMPTIVELY EXCLUSIVE OF OTHER FORMS OF RELIEF AGAINST THE UNITED STATES

The fundamental feature of workmen's compensation is its assurance that an employee injured at work will not be faced with a sudden loss of income if disabled. For where applicable, compensation benefits, unlike tort recoveries, are payable without resort to a *post hoc* assessment of fault or contributory negligence and without the delays, uncertainties, and legal expenses attendant upon tort litigation. The advantages in an industrial society of such an administrative remedy involving liability without fault for work-connected injuries has led to its widespread substitution for traditional, common law remedies. Employers have received in return insulation against the possibility of large tort judgments in those cases where the employee could have established the employer's negligence. Wherever it has been adopted, the exclusivity of the compensation remedy for on-the-job injuries is established as "the general rule." *Mandel* v. *United States*, 191 F. 2d 164, 166 (C.A. 3),

affirmed *sub nom. Johansen* v. *United States,* 343 U.S. 427.[12]

Congress passed the Federal Employees' Compensation Act in 1916.[13] It has subsequently been extended to protect almost every civilian officer and employee of all three branches of the federal government, including members of Congress and the federal judiciary.[14] By separate enactments Congress has given similar protection to those few persons who, for one reason or another, are not within the reach of F.E.C.A.[15] Thus Congress

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[12] See 2 Larson, *Workmen's Compensation Law* (1961 ed.) § 65.10: "Once a workmen's compensation act has become applicable through compulsion or election, it affords the exclusive remedy for the injury. This is part of the *quid pro quo* in which the sacrifices and gains of the employees and employers are to some extent put in balance, for, while the employer assumes a new liability without fault, he is relieved of the prospect of large damage verdicts."

[13] Act of September 7, 1916, ch. 458, 39 Stat. 742 (5 U.S.C. 751 *ff*).

[14] The Act of October 14, 1949, ch. 691, Title 1, § 108, 63 Stat. 860, now 5 U.S.C. 790(b)(1), amended the definition of employee for purposes of the act to include coverage for: "all civil officers and employees of all branches of the Government of the United States." This amendment eliminated the former distinction between "employees," who were covered, and "officers," who were not. See H. Rep. 729, 81st Cong., 1st Sess., p. 4; S. Rep. No. 836, 81st Cong., 1st Sess., pp. 14–15, 21. As the bill passed the House, it expressly excluded "Members of Congress [from] coverage." See S. Rep. No. 836, *supra*, p. 6. The Senate struck that exclusion from the bill and the House concurred in the Senate amendment. 95 Cong. Rec. 13606. See, Bureau of Employees' Compensation, Department of Labor, Awards Nos. X–1219981 and X–534580.

[15] *E.g.*, United States Park Police in the District of Columbia are covered by D.C. Code (1961 ed.) § 4–521 *ff.*; civilians employed by post exchanges, officers' messes, and other nonappropriated fund activities of the Armed Forces come under

has provided "systems of simple, certain, and uniform compensation for injuries or death of those in armed services" (*Feres* v. *United States*, 340 U.S. 135, 144; see 38 U.S.C. 301 *et seq.*). In common with the general rule under workmen's compensation legislation, the benefits thus afforded federal employees are paid without regard to fault or contributory negligence. And also in accord with general workmen's compensation precepts, these compensation remedies represent the exclusive avenue of relief against the United States for all persons eligible as a result of work-related injuries.

While certain federal compensation acts now expressly provide that the liability of the United States thereunder is exclusive of any other remedy,[16] this Court made clear in *Johansen* v. *United States*, 343 U.S. 427, that exclusivity was presumed without an explicit congressional declaration to that effect. *Johansen* involved two suits in behalf of government seamen injured in the course of their duties as civilian members of the crew of Army troop transports. Although each was concededly eligible for benefits under the Federal Employees' Compensation Act,

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5 U.S.C. 150k and 150k–1. See, *Rizzuto* v. *United States*, 298 F. 2d 748 (C.A. 10); *Lowe* v. *United States*, 292 F. 2d 501 (C.A. 5); *United States* v. *Forfari*, 268 F. 2d 29 (C.A. 9), certiorari denied, 361 U.S. 902; *Aubrey* v. *United States*, 254 F. 2d 768 (C.A.D.C.); *Lewis* v. *United States*, 190 F. 2d 22 (C.A.D.C.), certiorari denied, 342 U.S. 869.

[16] See 5 U.S.C. 757(b), added in 1949 to the Federal Employees' Compensation Act, 63 Stat. 861, and 5 U.S.C. 150k–1(c), added in 1958 to the act covering employees of nonappropriated fund activities, 72 Stat. 397.

they brought suit for damages against the United States under the Public Vessels Act[17] alleging that their injuries resulted from the government's negligence or the unseaworthiness of its vessel. Nothing in the Public Vessels Act precluded suit by those eligible for relief under the Compensation Act. And nothing in the language of the Compensation Act specified that liability thereunder to those within its coverage was exclusive.[18] Nevertheless, this Court agreed with the Second[19] and Third Circuits[20] that the benefits provided by the Compensation Act were the only remedy Congress had intended to provide the seamen, expressly disapproving two contrary Fourth Circuit holdings.[21]

The Court reasoned that, in passing the Public Vessels Act, Congress intended to waive the sovereign immunity of the United States from suit for the benefit of those who had theretofore been remediless when their persons or property were tortiously injured by federal employees. But Congress had previously provided federal employees with a compensation remedy. Finding no indication that any member

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[17] 43 Stat. 1112, as amended, 46 U.S.C. 781 *ff.*

[18] Congress added an exclusivity provision in 1949 after the injuries in question had occurred, 63 Stat. 861, 5 U.S.C. 757(b). Even that provision, however, was by its terms inapplicable "to a master or member of the crew of any vessel" and thus could not in any event determine the rights of the petitioners in *Johansen.*

[19] *Johansen* v. *United States*, 191 F. 2d 162.

[20] *Mandel v. United States*, 191 F. 2d 164.

[21] *Johnson* v. *United States*, 186 F. 2d 120, and *United States* v. *Marine*, 155 F. 2d 456. See 343 U.S. at 427.

of Congress thought the Public Vessels Act might confer additional rights on employees entitled to such benefits (343 U.S. at 431–432), the Court concluded that the "systems of simple, certain and uniform compensation for injuries or death" provided for federal employees were presumably exclusive, and that where "the Government has created a comprehensive system to award payments for injuries, it should not be held to have made exceptions to that system without specific legislation to that effect." *Id.* at 343 U.S. 440-441.

In *Johansen,* the Court noted that it had previously "accepted the principle of the exclusive character of federal plans for compensation in *Feres* v. *United States,* 340 U.S. 135" (343 U.S. at 440). That case held that no suit under the Federal Tort Claims Act would lie on behalf of a soldier injured incident to his service even though neither the Tort Claims Act nor the applicable federal compensation statutes in terms proscribed dual means of redress. And, in *Patterson* v. *United States,* 359 U.S. 495, the Court declined to overturn its ruling in *Johansen.* Instead, it reaffirmed that earlier decision and reemphasized its previous disapproval of a Fourth Circuit decision allowing recovery under the Suits in Admirality Act [22] to a federal employee eligible for compensation benefits.[23] The Court reiterated (359 U.S. at 496):

> The United States "has established by the Compensation Act a method of redress for its

[22] 46 U.S.C. 741 *ff.*

[23] See 359 U.S. at 496, n. 1.

employees. There is no reason to have two systems of redress."[24]

The lower federal courts have similarly adhered to the principle that federal plans for workmen's compensation are presumptively exclusive. They have held, uniformly, that persons for whom the government has supplied an administrative compensation remedy are precluded from seeking recovery against the United States for injuries received in the course of their work under the Federal Tort Claims Act, the Jones Act,[25] the Suits in Admiralty Act, or the Public Vessels Act. *Jarvis* v. *United States,* 342 F. 2d 799 (C.A. 5), certiorari denied, 382 U.S. 831; *Rizzuto* v. *United States,* 298 F. 2d 748 (C.A. 10); *Lowe* v. *United States,* 292 F. 2d 501 (C.A. 5); *Somma* v. *United States,* 283 F. 2d 149 (C.A. 3); *Mills* v. *Panama Canal Co.,* 272 F. 2d 37 (C.A. 2), certiorari denied, 362 U.S. 961; *United States* v. *Forfari,* 268 F. 2d 29 (C.A. 9), certiorari denied, 361 U.S. 902; *Balancio* v. *United States,* 267 F. 2d 135 (C.A. 2), certiorari denied, 361 U.S. 875; *Aubrey* v. *United States,* 254 F. 2d 768 (C.A.D.C.); *United States* v. *Firth,* 207 F. 2d 665 (C.A. 9); *Lewis* v. *United States,* 190 F. 2d 22 (C.A.D.C.), certiorari denied, 342 U.S. 869. See also, *Gradall* v. *United States,* 329 F. 2d 960, 963 (Ct. Cls.),

[24] In *Amell* v. *United States*, 384 U.S. 158, 160–161, the Court again noted that the recovery of seamen employed by the federal government "is limited strictly by a workmen's compensation statute governing them as federal workers to the exclusion of both the Public Vessels Act, *Johansen* v. *United States*, 343 U.S. 427, and the Suits in Admiralty Act, *Patterson* v. *United States*, 359 U.S. 495."

[25] 46 U.S.C. 688.

and *Denenberg* v. *United States*, 305 F. 2d 378, 379–380 (Ct. Cls.).

In short, it is not now open to serious dispute that all other compensation remedies provided by Congress for work injuries are exclusive. *Granade* v. *United States*, 356 F. 2d 837, 840–841 (C.A. 2). Neither soldiers nor Senators, janitors nor judges, injured in the course of federal employment may seek tort recovery against the government for such injuries.[26] As we show in the next point, there is no reason to construct an exception to that rule for the sole benefit of federal prisoners.

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[26] *United States* v. *Brown*, 348 U.S. 110, and *Brooks* v. *United States*, 337 U.S. 49, cited by the court below (R. 30–31) are not authority to the contrary. Unlike the case at bar, those cases did not involve injuries incurred in the course of employment for which workmen's compensation was provided. Rather, they involved the right of servicemen to bring suit under the Federal Tort Claims Act for injuries they incurred off duty or after discharge. *Brown* involved a veteran injured after his release from active duty. Although relief was available under veterans' benefit statutes, the Court distinguished such benefits from the usual workmen's compensation remedy. 348 U.S. at 113. The Court stressed that for injuries to servicemen that did arise incident to their service no Tort Claims Act suit would lie. *Ibid.* In *Brooks*, involving soldiers injured on furlough, the Court specifically noted: "Were the accident incident to the Brooks' service, a wholly different case would be presented." 337 U.S. at 52. When in *Feres* v. *United States*, 340 U.S. 135, military personnel sought to recover under the Tort Claims Act for injuries which were incident to their service, the Court held that such actions would not lie, stating (340 U.S. at 138): "This is the 'wholly different case' reserved from our decision in *Brooks* v. *United States*, 337 U.S. 49, 52."

II

CONGRESS INTENDED COMPENSATION UNDER 18 U.S.C. 4126 TO BE AN EXCLUSIVE REMEDY

The court of appeals took the position that, where a compensation program is intended to be exclusive, "it is to be expected that Congress will express such intention in the compensation statute" (R. 28). We submit, however, that silence will not support the inference that the court of appeals sought to draw from it, and that this is particularly clear in light of the context in which Section 4126 was first adopted and later amended.

Payment of compensation "to inmates of penal institutions or their dependents for injuries suffered in any industry" was first authorized by Congress in 1934 as part of the legislation creating Federal Prison Industries, Inc.[27] Congress did not specify that such compensation payments were to be the exclusive remedy for such injuries for the obvious reason that no alternative remedy was even potentially available in 1934—twelve years before the enactment of the Federal Tort Claims Act. Omission of reference to exclusivity in the 1934 legislation cannot be distinguished from the similar omission in the Federal Employees Compensation Act of 1916, as to which the Court noted in *Johansen* v. *United States*, 343 U.S. 427, 433:

> It is quite understandable that Congress did not specifically declare that the Compensation Act

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[27] Act of June 23, 1934, ch. 736, Sec. 4, 48 Stat. 1211-1212. The Federal Prison Industries was established as a District of Columbia corporation and a "governmental body" to expand an industrial training and rehabilitation program for prisoners initiated by the Act of May 27, 1930, ch. 340, 46 Stat. 391.

> was exclusive of all other remedies. At the time of its enactment, it was the sole statutory avenue to recover from the Government for tortious injuries received in Government employment. Actually, it was the only, and therefore the exclusive, remedy.

In short, contrary to the view of the court of appeals, it was hardly to be expected that Congress should explicitly preclude alternative remedies at a time when no such remedies existed.

The prisoner compensation provision of Section 4126 remained unchanged from 1934 to 1961. In 1961 Congress expanded the coverage of Section 4126 so as to include not only prisoners' injuries suffered in "any industry" but also in "any work activity in connection with the maintenance or operation of the institution where confined."[28] Notwithstanding the enactment of the Federal Tort Claims Act in 1946, the 1961 amendment of Section 4126 was adopted under circumstances warranting Congress's assumption that prisoners not qualifying for compensation were entirely without remedy if injured at work. A substantial number of federal courts had ruled that prisoners could not recover from the United States under the Federal Tort Claims Act.[29] There were no con-

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[28] Act of September 26, 1961, 75 Stat. 681, 18 U.S.C. 4126.

[29] See, *James* v. *United States*, 280 F. 2d 428 (C.A. 8), certiorari denied, 364 U.S. 845; *Lack* v. *United States*, 262 F. 2d 167 (C.A. 8); *Jones* v. *United States*, 249 F. 2d 864 (C.A. 7); *Berman* v. *United States*, 170 F. Supp. 107 (E.D.N.Y.); *Golub* v. *United States*, Civ. No. 148–117, S.D.N.Y. (October 5, 1959); *Collins* v. *United States*, No. T–1509, D. Kan. (Jan. 29, 1958); *Trostle* v. *United States*, No. 1493, W.D. Mo. (Feb. 20, 1958);

trary holdings. It was not until 1963 that this Court held that the claims of prisoners were not barred as such under the Tort Claims Act. *United States* v. *Muniz,* 374 U.S. 150. Moreover, private bills for the relief of prisoners injured while engaged in maintenance work were passed by Congress in light of advice from the Department of Justice that such prisoners not only were outside the coverage of Section 4126 because not engaged in prison industries but also had "no standing to sue the U.S. Government * * * under the Federal Tort Claims Act." [30]

In light of the apparent absence of any remedy (other than private legislation) for prisoners injured in maintenance or operational work, in 1961 Attorney General Kennedy sought legislation affording such prisoners "the same compensation provisions as are applicable to inmates employed by Federal Prison Industries." [31] The Attorney General's proposal was accepted by Congress without debate.[32] Nevertheless, it is perfectly clear from the only pertinent legislative history, the House Judiciary Com-

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Van Zuch v. *United States*, 118 F. Supp. 468 (E.D.N.Y.); *Shew* v. *United States*, 116 F. Supp. 1 (M.D.N.C.); *Sigmon* v. *United States*, 110 F. Supp. 906 (W.D. Va.); *Ellison* v. *United States*, No. 1003, W.D.N.C. (July 26, 1951).

[30] S. Rep. No. 1944, 86th Cong., 2d Sess. (1960) (accompanying H.R. 9715, which became Act of September 14, 1960, 74 Stat. A101). See, also, S. Rep. No. 1180, 87th Cong., 2d Sess. (1962) (accompanying H.R. 4381, which became Act of February 16, 1962, 76 Stat. 1266).

[31] See, H. Rep. No. 534, 87th Cong., 1st Sess., p. 3; S. Rep. No. 1056, 87th Cong., 1st Sess., p. 3.

[32] 75 Stat. 681.

mittee Report,[33] that Congress acted on the assumption, consistent with the uniform view of every court which had then considered the matter, that no remedy was available under the Federal Tort Claims Act, and that the compensation program authorized by Congress was an exclusive remedy. The report stated the purpose of the bill to be that of extending "equivalent compensation" to prisoners injured while working in activities other than those of Federal Prison Industries. Such extension was necessary because:

> Presently there is no way under the general law to compensate prisoners injured while so engaged. Their only recourse has been to appeal to Congress, and this committee has reported numbers of private relief bills for such prisoners.[34]

There can be no doubt, therefore, that, in the contemplation of Congress, the compensation program which it was thus expanding did not accord (any more than any other federal compensation program) a dual remedy for workmen's injuries. Indeed, the retention of the proviso to Section 4126 that "[i]n no event shall compensation be paid in a greater amount than that provided in the Federal Employees' Compensation Act" confirms the overwhelmingly plausible assumption that Congress had no purpose to treat prisoners more favorably than federal employees generally.

In sum, nothing in the legislative history of Section 4126 indicates any congressional intent to depart

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[33] H. Rep. No. 534, 87th Cong., 1st Sess., pp. 1–2.

[34] *Id.* at p. 2.

from "the principle of the exclusive character of federal plans for compensation" affirmed by the Court in *United States* v. *Johansen,* 343 U.S. 440, and *Patterson* v. *United States,* 359 U.S. 495. The Court pointed out in *Patterson* that it would not readily be moved to reverse the doctrine of *Johansen* since "Congress can rectify our mistake, if such it was, or change its policy at any time" (359 U.S. at 496). But Congress has never indicated that it was not in complete accord with *Johansen.* In extending the coverage of compensation for prisoners in Section 4126 Congress quite plainly assumed that *Johansen* and *Patterson* were "part of the arch on which the new structure rests"; the Court should, therefore, "refrain from disturbing them lest [it] change the design that Congress fashioned." *State Bd. of Ins.* v. *Todd Shipyards,* 370 U.S. 451, 458.[35]

Notwithstanding the evidence that Congress intended Section 4126 as an exclusive remedy for those within its coverage, the court of appeals felt constrained by this Court's recent decision in *United States* v. *Muniz,* 374 U.S. 150, to allow additional relief under the Federal Tort Claims Act. For the reason given below, however, it is apparent that *Muniz* neither requires nor foreshadows such a result.

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[35] See, also, *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 340, n. 17, 349; *Davis* v. *Department of Labor* 317 U.S. 249; *Toolson* v. *New York Yankees, Inc.,* 346 U.S. 356; cf. *United States* v. *Dixon,* 347 U.S. 381; *Overstreet* v. *North Shore Corp.,* 318 U.S. 125, 131–132.

III

UNITED STATES V. *MUNIZ* DID NOT OVERTURN THE RULE THAT FEDERAL COMPENSATION REMEDIES ARE PRESUMPTIVELY EXCLUSIVE, NOR DID IT EXEMPT PRISONER COMPENSATION UNDER 18 U.S.C. 4126 FROM THAT RULE

The court of appeals believed that the reasoning of this Court's decision in *United States* v. *Muniz*, 374 U.S. 150, required it to allow a tort remedy to a prisoner eligible for compensation benefits under 18 U.S.C. 4126. Analysis of *Muniz* makes it apparent, however, that the Second Circuit was correct in concluding "that the Third Circuit in *Demko* misinterpreted the opinion of the Court in *Muniz*." *Granade* v. *United States*, 356 F. 2d 837, 842.[36]

1. Whether a prisoner eligible for compensation benefits may also claim additional rights against the United States under the Tort Claims Act was an issue neither presented to, nor decided by, the Court in *Muniz*. The case held that an inmate of a federal prison, claiming to have suffered injury from the negligent acts of prison officials, is not barred from suing the United States under the Tort Claims Act solely by reason of his status as a prisoner. But, as the Court recognized (374 U.S. at 160), neither Muniz nor his co-

[36] We note that the author of the *Granade* opinion was a member of the majority in the *en banc* decision in *Winston* v. *United States*, 305 F. 2d 253, 264, which was affirmed by this Court *sub nom. United States* v. *Muniz*, *supra*, and that one of the judges concurring in *Granade* was the author of that *en banc* opinion.

petitioner, Winston, was eligible for compensation under 18 U.S.C. 4126 for the injuries which he allegedly suffered in prison. (Muniz was assaulted by other inmates during the course of a prison riot; Winston alleged malpractice on the part of prison medical officials.)

Certiorari was granted in *Muniz,* the Court stated (374 US at 151, n. 3), to resolve a conflict between the holding of the Second Circuit in *Winston* v. *United States,* 305 F. 2d 253, [illegible], allowing prisoners suits under the Federal Tort Claims Act, and contrary decisions of the Seventh and Eighth Circuits barring such suits by reason of the prisoner status alone. *James* v. *United States,* 280 F. 2d 428 (C.A. 8), certiorari denied, 364 U.S. 845; *Lack* v. *United States,* 262 F. 2d 167 (C.A. 8); *Jones* v. *United States,* 249 F. 2d 864 (C.A. 7). In none of these conflicting Seventh and Eighth Circuit cases were the prisoners who sought relief under the Tort Claims Act eligible for federal compensation benefits.[37] In short, the Court had no occasion to pass upon the issue here presented.

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[37] Plaintiff in *Jones v. United States*, 249 F. 2d 864 (C.A. 7) was confined in District of Columbia penal institutions, beyond the reach of 18 U.S.C. 4126. In *Lack* v. *United States*, 262 F. 2d 167 (C.A. 8), the plaintiff was injured while engaged in a type of work which, as the Eighth Circuit expressly noted, at that time was not covered by 18 U.S.C. 4126. See 262 F. 2d at 169. Plaintiff's complaint in *James* v. *United States*, 280 F. 2d 428 (C.A. 8), alleged that he was injured when he "was deliberately attacked in the corridor of floor 1–3 by inmate Chapman, No. 8728." Thus, like Muniz, James was not injured in the course of employment and therefore was not covered by 18 U.S.C. 4126.

2. To be sure, this Court did say in Muniz that "the presence of a compensation system, persuasive in *Feres,* does not of necessity preclude a suit for negligence" (374 U.S. 150, 160). While the court of appeals apparently found this language compelling, we agree with the Second Circuit [37a] that the statement is to be understood in relationship to the argument advanced in that case that a sufficiently comprehensive compensatory scheme may, in effect, occupy the field so as to oust all other remedies even for unincluded injuries. It was in this context that the Court went on to point out that

> * * * the compensation system in effect for prisoners in 1946 was not comprehensive. It provided compensation only for injuries incurred while engaged in prison industries. Neither Winston nor Muniz would have been covered. [374 U.S. at 160. Footnote omitted.]

The proposition that the mere presence of a compensation system does not preclude a suit by one ineligible for its benefits does not entail the conclusion that a suit for negligence is afforded one who is eligible for and has received compensation benefits. The right to bring a tort suit against an employer for an injury that is non-compensable under workmen's compensation because not work-connected is entirely consistent with the exclusive character of workmen's compensation within the scope of its coverage. See *United States* v. *Browning,* 359 F. 2d 937 (C.A. 10); *Canon* v. *United States,* 111 F. Supp. 162, 167 (N.D. Cal.), affirmed, 217 F. 2d 70 (C.A. 9); 2 Larson,

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[37a] *Granade* v. *United States, supra,* 356 F. 2d at 841–842.

Workmen's Compensation Law (1961 ed.) § 65.10. Demko, unlike Muniz and Winston, had a workmen's compensation remedy because his injuries were sustained in the course of prison work activities.

It seems evident that in *Muniz* the Court's attention was focused on issues entirely distinct from those which it resolved in *Johansen* and *Patterson*. Not unexpectedly, the Court made no attempt to distinguish those cases.[28] In these circumstances, we submit that the court of appeals erred in reading *United States* v. *Muniz* as abandoning, *sub silentio*, the carefully considered position which this Court had reaffirmed but a few terms earlier in *Patterson*.

3. Relying on its interpretation of *Muniz*, the court of appeals found (R. 28–31) that Section 4126 involved a compensation program not sufficiently comprehensive to warrant the presumption of exclusivity recognized by this Court in *Johansen* and *Patterson*. It is far from clear what relevance comprehensiveness has in considering a compensable injury. While comprehensiveness of coverage was certainly relevant to the question, faced in *Muniz*, whether prisoners are invariably barred from access to all tort remedies, it seems wide of the mark where the question is the availability of an additional remedy for a concededly compensable injury. It is true of compensation acts generally that, where an injury is not covered because it is not work-connected, no immunity from tort suit is

[28] Indeed, in *Muniz* the Court made no mention of *Patterson* at all and cited *Johansen* in a single footnote relating to a collateral issue. 374 U.S. at 155, n. 9.

afforded the employer.[39] Conversely, where compensation benefits are available, the compensation statutes provide the exclusive means of relief.[40] There is no reason to adopt a different approach in interpreting 18 U.S.C. 4126.

In addition, we believe that the court of appeals was mistaken in its appraisal of the program. Section 4126 affords protection to any inmate injured in the course of employment. Specifically, it provides compensation for "injuries suffered in any industry or in any work activity in connection with the maintenance or operation of the institution where confined." The scope of the section is thus "comprehensive" in the same sense any workmen's compensation statute is comprehensive; it provides redress for those injuries which arise out of work situations. Workmen's compensation legislation normally does not, and is not intended to, compensate injuries unrelated to work or incurred off duty. Thus, the Federal Employees' Compensation Act covers injuries "sustained while in the performance of * * * duty" (5 U.S.C. 751(a)). The Longshoremen's and Harbor Workers' Act similarly only protects against employment accidents,[41] as do State workmen's compensation schemes.[42] In short, Section 4126 cannot be distinguished from other

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[39] 2 Larson, *Workmen's Compensation Law* (1961 ed.) § 65.10.

[40] *Cifolo* v. *General Electric Co.*, 305 N.Y. 209, 112 N.E. 2d 197; the cases cited at pp. 11–17, *supra;* and 2 Larson, *Workmen's Compensation Law* (1961 ed.) § 65.00.

[41] 33 U.S.C. 902(2).

[42] See, *e. g.*, *New York Workmen's Compensation Law* § 10 (emphasis added):

> Every employer subject to this chapter shall in accordance

workmen's compensation programs in terms of the category of accidents covered.

Nor can the prisoner compensation program be distinguished from other forms of workmen's compensation on the basis of the measure of the benefits conferred. Respondent was totally disabled as a result of an employment accident at the Lewisburg Penitentiary in Pennsylvania. In compensation for that disability he was awarded benefits under 18 U.S.C. 4126 of $180.00 per month (R. 7).[43] Had respondent been been similarly disabled in private rather than prison employment, he would have received a fairly comparable award under the workmen's compensation law of Pennsylvania, his home State. The *maximum* workmen's compensation award for permanent total disability in Pennsylvania is $47.50 per week, provided that the injured employee's wages exceeded $71.00 weekly.[44] Lesser earnings would reduce that award under Pennsylvania law to as little as $20.00 per week.[45] But such compensation would also have been respondent's exclusive remedy, for no tort ac-

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with this chapter * * * secure compensation to his employees and pay or provide compensation for their disability or death *from injury arising out of and in the course of the employment* without regard to fault as a cause of the injury * * *.

See also 1 Larson, *Workmen's Compensation Law* (1965 ed.) § 20.

[43] That figure represents the minimum monthly amount then specified in the Federal Employees' Compensation Act, 5 U.S.C. (1964 ed.) 756(c). Section 4126 provides that: "In no event shall compensation be paid in a greater amount than that provided in the Federal Employees' Compensation Act."

[44] Purdon's Penna. Stat. Ann., Title 77 (1965 Cum. Ann. Pocket Part), § 511.

[45] *Ibid.*

tion lies against a Pennsylvania employer where the employee is eligible for compensation benefits.[46]

While respondent's redress under the workmen's compensation scheme of Pennsylvania would be about the same as his remedy under 18 U.S.C. 4126, most other jurisdictions are not so generous. The award of $180.00 per month to respondent is greater than the maximum workmen's compensation award provided workers generally for total disability in fully half the States; it exceeds the minimum award in all of them.[47] Moreover, unlike restrictions contained in the workmen's compensation legislation of twenty-four States, there is no arbitrary limit on the period during which compensation is payable under 18 U.S.C. 4126.[48] Nor is there any fixed maximum total compensation which may be paid. Thus, if respondent

[46] Purdon's Penna. Stat. Ann., Title 77, § 481; *Steets* v. *Sovereign Const. Co.*, 413 Pa. 458, 198 A. 2d 590. Absent a written agreement to the contrary made at the time of employment, under Pennsylvania law it is conclusively presumed that the workmen's compensation act applies to an employment relationship. Purdon's Penna. Stat. Ann., Title 77, §§ 461, 462.

[47] For example, the minimum and maximum weekly compensation benefits payable in cases of permanent total disability in the following States are as follows: Alabama, $5.00–31.00; California, $20.00–52.50; Colorado, $10.00–40.25; District of Columbia, $18.00–54.00; New Jersey, $10.00–40.00; New York, $20.00–50.00; Ohio, $40.25–49.00; Texas, $9.00–35.00; Washington, $28.85–56.77 (with five dependents, plus allowance of $75.00 for constant attendant, if necessary). A complete table of the weekly maximum and minimum compensation benefits payable in each State in cases of permanent total disability appears in 2 Larson, *Workmen's Compensation Law* (1961 ed.), pp. 524–526.

[48] See 2 Larson, *op. cit. supra*, n. 47.

were to continue receiving the benefits awarded him for twenty-five years,[49] he would receive in total some $54,000.00. This figure is more than double—in some cases quadruple—the maximum compensation benefits payable in twenty-eight States.[50]

Other benefits provided in the regulations under Section 4126 are similarly in accord with workmen's compensation programs generally. For example, all necessary medical, surgical and hospital care is provided without cost to an inmate injured at work not only while he remains incarcerated, but after discharge as well;[51] prisoners hurt in the course of paid employment with Federal Prison Industries, Inc., continue to draw their pay while disabled;[52] and provision is made for lump-sum payments as well as for awards to dependents.[53] There is thus no merit to the view that the remedy under 18 U.S.C. 4126 is not comparable to that commonly afforded by workmen's compensation.

Concededly, the court below correctly observed that compensation is paid only upon an inmate's release from prison and is denied if he recovers while still in

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[49] Respondent was born October 21, 1929, and was 34 years old when he commenced receiving compensation benefits in 1963.

[50] *E.g.*, the total *maximum* compensation for permanent total disability in Alabama is $12,400; in Arkansas, $12,500; in Colorado, $12,598.25; in Georgia, $10,000; in New Hampshire, $13,640; in Rhode Island, $16,000. See 2 Larson, *op. cit. supra*, n. 47.

[51] 28 C.F.R. § 301.8, Compensation Pamphlet ¶¶ 2, 17 (R. 13, 18).

[52] 28 C.F.R. § 301.1, Compensation Pamphlet ¶ 11 (R. 17).

[53] 28 C.F.R. §§ 301.3, 301.9; Compensation Pamphlet, ¶¶ 14, 15 (R. 17–18).

prison and is not disabled upon discharge.[54] But there is nothing untoward in such a rule. Workmen's compensation benefits are intended to make up for loss of earnings; they are not payable after the disability has ceased and wage-earning capacity has been fully restored. It is hardly necessary to point out that a disability is of no economic significance to a prisoner during the period of his incarceration, since he is provided with food, clothing, shelter and medical attention.[55] The economic loss which Section 4126 is designed to insure against is precisely that resulting from a disability acquired in prison but persisting after discharge. The same reasons, of course, explain the cut-off of compensation payments to reincarcerated prisoners. The court below failed to note, however, that even in such cases compensation can still be paid to the dependents of a recommitted inmate.[56]

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[54] 28 C.F.R. §§ 301.1, 301.2, Compensation Pamphlet ¶ 16 (R. 18).

[55] As we pointed out above, p. 30, those inmates injured in paid prison jobs do continue to receive their wages while disabled. 28 C.F.R. § 301.1, Compensation Pamphlet ¶ 11.

[56] 28 C.F.R. § 301.5, Compensation Pamphlet ¶ 16 (R. 18). While not relied on by the court below, we note that benefits under 18 U.S.C. 4126 are not payable if the injury is caused by the willful misconduct of the inmate himself. 28 C.F.R. § 301.4, Compensation Pamphlet ¶ 10 (R. 16). But this is a limitation generally found under workmen's compensation statutes. Thus similar provisions restrict awards under the Federal Employees' Compensation Act, 5 U.S.C. 751(a) and under State workmen's compensation statutes, *e.g.*, New York Workmen's Compensation Law § 10. See 1 Larson, *Workmen's Compensation Law* (1965 ed.) §§ 32.00–32.20.

The court of appeals further found the prisoner compensation program inadequate in that the regulations provide "no opportunity for administrative review" (R. 29). Insofar as the court's concern was based upon its apprehension that compensation awards were subject to the same "dominion which was at the origin of the inmate's injury" (R. 29), it appears that the court mistakenly assumed that the officials directly supervising the working inmates were also responsible for deciding whether a compensation award would be made. In fact, however, the administrators of Federal Prison Industries in Washington, D.C., and not local prison officials, are responsible for the administration of the compensation program and the allowance of awards (R. 14, 15).

In any event, the availability of formal review is not a prerequisite to the exclusivity of a remedy. The Federal Employees Compensation Act, long recognized as an exclusive remedy for those within its coverage, explicitly provides (5 U.S.C. 793):

> * * * The action of the Secretary or his designees in allowing or denying any payment * * * shall be final and conclusive for all purposes and with respect to all questions of law and fact, and not subject to review by any other official of the United States, or by any court by mandamus or otherwise * * *.

In affirming the dismissal of a claim under the Compensation Act for want of jurisdiction, the Second Circuit wrote in *Blanc* v. *United States*, 244 F. 2d 708, 710, certiorari denied, 355 U.S. 874:

> Though it may be informal, agency action which amounts to a genuine, fair consideration

> of a claim for benefits and not merely an arbitrary flouting of it, satisfies constitutional requirements and precludes further court review.[57]

There has been no suggestion that the consideration of prisoners' claims for compensation under 18 U.S.C. 4126 have been lacking in fundamental fairness.

Finally, the court of appeals attached importance to the fact that, although it authorize the establishment of a compensation program for prisoners, Section 4126 is "permissive rather than mandatory" (R. 28). This objection was fully answered in *Granade* v. *United States*, 356 F. 2d 837, 843. The Second Circuit there noted that, while Section 4126 neither explicitly requires that a compensation system be established nor specifies the mode of its operation,

> * * * nevertheless a compensation scheme has been established and embodied in regulations. This system of compensation does not become less than comprehensive simply because the details of the system are spelled out in regulations rather then in the authorizing statute. And an examination of the regulations makes it quite clear that an award of compensation under Section 4126 is not discretionary but is mandatory as to any claim that comes within their terms.

Section 4126 is not unique among compensation systems in leaving implementation to administrative reg-

[57] See, also, *Soderman* v. *United States Civil Service Commission*, 313 F. 2d 694 (C.A. 9), certiorari denied, 372 U.S. 968; *Rivera* v. *Mitchell*, 244 F. 2d 783 (C.A.D.C.), certiorari denied, 355 U.S. 862; *Hancock* v. *Mitchell*, 231 F. 2d 652 (C.A. 3); *Calderon* v. *Tobin*, 187 F. 2d 514 (C.A.D.C.), certiorari denied, 341 U.S. 935.

ulation. The compensation provision for employees of certain military establishments operating on non-appropriated funds under 5 U.S.C. 150k–1 [58] has uniformly been held to be exclusive although, until its amendment in 1958,[59] the details of its operation were left to administrative regulation.[60]

Although the prisoner compensation program has now operated for three decades under regulations promulgated by the Attorney General, Congress has never indicated that the conduct of the program was in conflict with its purposes or unsatisfactory in any other respect. On the contrary, as noted above (see pp. 19–21, *supra*), Congress expanded the coverage of Section 4126 so as to provide compensation for prisoners injured while engaged in maintenance or operational work *"to the same extent* as compensation is now payable to inmates or their dependents for injuries suffered while engaged in work for Federal Prison Industries." [61] In other words, while expanding the coverage of the system, Congress indicated no interest in altering the mode of operation or increasing the

[58] 66 Stat. 139.

[59] 72 Stat. 397.

[60] See *Rizzuto* v. *United States*, 298 F. 2d 748 (C.A. 10); *Lowe* v. *United States*, 292 F. 2d 501 (C.A. 5), affirming 185 F. Supp. 189 (N.D. Miss.); *United States* v. *Forfari*, 268 F. 2d 29 (C.A. 9), certiorari denied, 361 U.S. 902; *Aubrey* v. *United States*, 254 F. 2d 768 (C.A.D.C.). While it is true that even before the 1958 amendment, Section 150k–1 provided for compensation not less than that provided in the State where the employees worked, the Second Circuit found that "with this exception, old Section 150k–1 was no more detailed than is Section 4126." *Granade* v. *United States*, 356 F. 2d at 843, n. 11.

[61] H. Rep. No. 534, 87th Cong., 1st Sess. (1961), p. 1 (emphasis added).

benefits awarded. The conclusion that Congress was fully satisfied with the administration of the system under the Attorney General's regulations is further substantiated by the private bills enacted for the relief of injured prisoners not within the coverage of Section 4126 as it stood prior to 1961. Such bills commonly provided for payment of an amount determined in accordance with the regulations for those within the coverage of Section 4126.[62]

In sum, the compensation remedy afforded under 18 U.S.C. 4126 is not materially distinguishable from the usual relief furnished under workmen's compensation schemes. The court of appeals erred, we submit, in departing from the established rule which holds such remedies, where applicable, exclusive.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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AUGUST 1966.

[62] See, *e.g.*, S. Rep. 1180, 87th Cong., 2d Sess. (1962), p. 3; S. Rep. No. 1192, 87th Cong., 2d Sess., pp. 1–2.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

NO. 76

UNITED STATES OF AMERICA, PETITIONER

v.

STEPHEN ROBERT DEMKO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

COUNTER STATEMENT OF QUESTION INVOLVED

Are the rights of federal prisoners to maintain suits for negligence under the broad and sweeping policy of the Federal Tort Claims Act to be obliterated by virtue of a sketchy and severely restricted compensation system promulgated both prior and subsequent to the enactment of the Federal Tort Claims Act and when Congress never expressed such intention in the compensation statute?

Additional Statement

Respondent accepts the government's statement of the case with these additional details.

Respondent was an inmate of the Lewisburg Penitentiary, Lewisburg, Pennsylvania, pursuant to a sen-

tence imposed by the United States District Court for the Western District of Pennsylvania, for interstate transportation of fraudulent checks, having begun to commence the service of this sentence in June of 1960. It further appears that approximately one week before March 12, 1962, which is the date on which the accident occurred, that respondent was placed on the sick list at the Lewisburg Penitentiary and was receiving medical treatment for flu.

On March 12, 1962 at about 10:00 A.M., at the direction of James Hall, Construction Supervisor, respondent was ordered to replace blownout windows in the Lewisburg Penitentiary Power Plant. He was directed to perform this activity because of his previous carpentry experience. Respondent indicated to the construction supervisor that he intended to go on sick call that morning in order to receive penicillin shots but Hall, nevertheless, insisted that he perform the assignment immediately.

Respondent was required to replace blown out windows on one wall of the Power House, which were elevated approximately 15 feet from the floor thereof. No scaffolding or step ladder equipment was provided. The only available medium to climb up the wall were steel beams which ran horizontally to the floor at distances of approximately 4 to 5 feet apart. These beams were about 8 inches in depth. The wall itself was composed of smooth yellow tile, which that day was wet from rain and snow which had been blown in from the broken window openings. Respondent precariously balanced himself on an angle iron cross bar, placing one hand against the wall and with the other hand attempted to manipulate a 40 x 60 inch plate of glass into

a rubber gasket through the use of a screwdriver. While respondent attempted to balance himself in this position and insert the glass into the gasket, the glass broke, catapulting respondent to the outside and causing him to fall to the ground below for a distance of approximately 37 feet.

Respondent, age 35, has a high school education and is a carpenter by profession, having performed carpentry work since he was 15 years of age. He is both a rough and finished carpenter.

As a result of the fall, aside from serious head and facial injuries, he suffered comminuted fractures of the ankle and tibia of the right foot as well as injuries to his back and spine. His right ankle has been fused. He cannot walk upgrade and must hold on when walking up steps. He is unable to do any climbing.

Respondent is totally and permanently injured and is incapable of performing his profession as a carpenter for the rest of his life.

As a finished carpenter his profession would net him from $9,000.00 to $15,000.00 per annum or an income of $750.00 to $1,250.00 per month.

Perhaps it might be argued that respondent, sensing the manifest danger of the assignment—as any federal employee might have done—should have refused to ascend the perilous height without the assistance of tools and normal devices required to perform the work in a safe manner. Refusal to perform this task or any other assignment, no matter how ill-conceived, would have meant his being placed in the "hole" under solitary confinement.

Summary of Argument.

It is noteworthy that *respondent is not seeking two recoveries,* but is asking for an amount sufficient to adequately compensate him for his injuries. It is stipulated that $20,000.00, which is the amount of the stipulated judgment, *in addition* to the compensation already paid and to be paid respondent in the future would adequately compensate respondent for the injuries sustained.

No prejudice could possibly arise where compensation has been paid to a prisoner in a work connected injury who has received an award for injuries in view of the practice of the United States Courts to require the return of such compensation and/or a corresponding reduction in the award. This Court is amply aware of the numerous Jones Act cases where this procedure has been followed.

SUMMARY OF ARGUMENT

I

This court has unequivocably concluded that suits under the Federal Tort Claims Act can be maintained by Federal prisoners for personal injuries sustained during confinement in prison by reason of negligence of government employees. *United States v. Muniz,* 374 U.S. 150, 26 U.S.C. 1346(b).

II

The government's contention, that inmates entitlement to compensation violates a fundamental rule that one remedy against the government for each wrong suffered, is without merit. In *Brooks v. United States,*

387 U.S. 49 and *United States v. Brown,* 348 U.S. 110, this Court on different occasions upheld the proposition that a recovery can be achieved under the Tort Claims Act concurrently with the existence of a compensation system designed to cover the same injury. It was concluded in these cases that provisions in other statutes for disability payments to servicemen and gratuity payments to their survivors which exist without making such payments exclusive or providing for an election of remedies indicate no purpose to forfeit action against the United States under the Tort Claims Act.

Congress, of course, has the right to make a compensation act an exclusive remedy; but where Congress, by an examination of its intention, has given no indication that it has made the right of compensation an exclusive remedy should not arbitrarily have foisted upon it an interpretation which vitiates the broad and sweeping policy of the Federal Tort Claims Act.

III

The government's reliance upon *Feres v. United States,* 340 U.S. 135, wherein this Court denied recovery under the Tort Claims Act holding that the government is not liable under that Act for injuries to servicemen arising in a course of activity incident to military service involves the "peculiar and special relationship of the soldier to his superiors", and is not analogous to a suit by a federal prisoner. An examination of the reasons for the *Feres* decision reveals why an argument persuasive with soldiers injured in the course of duty is not persuasive with federal prisoners. *United States v. Muniz,* 374 U.S. 150.

IV

The prison compensation system is an inadequately comprehensive compensation system sufficient to indicate an intention on the part of Congress to preempt the sweeping provisions of the Federal Tort Claims Act by reason of its sketchy, discretionary and highly restrictive provisions, 18 U.S.C.A. 4126. Simply because the Federal Employees Compensation Act precludes recovery under the Tort Claims Act does not require that all Federal Compensation Systems be interpretated as providing the exclusive remedy.

The holding in *Johansen v. United States,* 343 U.S. 427, precluded the plaintiff from recovering under the Public Vessels Act for the reason that coverage existed under the Federal Employees Compensation Act which is such a comprehensive compensation program as by its very nature presumed to provide an exclusive remedy. The prisoners compensation system, unlike the Federal Employees Compensation Act, does not provide a system of "simple, certain and uniform" compensation for injuries or death.

V

This Court has enunciated the doctrine that it will not pronounce an election of remedies when Congress has not done so. *Brooks v. United States,* 337 U.S. 19. Congress intended those exceptions which are outlined with extreme particularity under the Tort Claims Act and provisions in other statutes dealing with disability payments in no way necessarily indicates an intention on the part of Congress to forfeit tort actions under the Tort Claims Act. Congress was well aware of the claims of federal prisoners and its failure to exclude

them from the provisions of the Tort Claims Act in 18 U.S.C. 2680 was deliberate. *United States v. Muniz,* 374 U.S. 150. There is no justification for this Court to read exemptions into the Tort Claims Act beyond those provided by Congress. If the Act is to be altered that is a function for the same body that adopted it. *Rayonier, Inc. v. United States,* 352 U.S. 315, 320.

For all intents and purposes the government inferentially is telling this Court to resolve all doubts against federal prisoners and to invoke the thesis that Congress intends and desires to stigmatize federal prisoners and relegate them to inferior status relative to their civil rights for tort liability. It must follow from the government's argument that enactment of any form of compensation no matter how weak, impotent, ineffective and restrictive in coverage, must constitute the sole basis of relief. That when compensation was limited to 20% of inmates engaged in prison industry, it was the exclusive remedy despite the Federal Tort Claims Act which became operative in 1946.

VI

The compensation scheme for prisoners is not "simple, certain and uniform" as to evidence a Congressional intent to provide an exclusive remedy. In comparison with the military compensation program, 38 U.S.C. 700, the prison-work compensation plan is vastly less comprehensive and is in no real sense a substitute for tort liability, and is vastly different from the right to compensation enjoyed by government employees under the Federal Employees Compensation Act.

It is permissive rather than mandatory; the amount of award is discretionary with the Attorney-General;

it is payable only upon release from prison and will be denied if full recovery occurs; no right exists to a personal physician at his physical examination; no opportunity for administrative review is available; payment is contingent upon the inmates good conduct at the time of his release. It is not all inclusive—being unavailable to inmates who are sick, the aged, those with serious physical and mental handicaps; being unavailable to inmates newly admitted and those in transit; being unavailable to inmates confined in the District of Columbia; being unavailable to inmates engaged in certain types of road construction; being unavailable to inmates suffering injuries as a result of intentional attacks of fellow inmates; being unavailable to inmates loaned to military bases; and being unavailable to inmates injured during confinement at any other time than when engaged in performance of prison industry or maintenance activity.

VII

Congress has ample reason in the interest of sound public policy to favor the right of prisoners to seek relief under the Federal Tort Claims Act. The prisoner is permitted to do nothing except under the direction of the officers of the prison and must live and work under conditions imposed on him. He is not a free agent and is completely at the mercy and whim of prison guards. What would do more to eliminate sadistic, brutal and inhumane guards from the rosters of federal penal institutions than the realization that to subject inmates to dangerous work assignments without reasonable safeguards normally provided federal employees or any other employees, would subject the government to tort liability?

ARGUMENT

I

Suits by Federal Prisoners Are Maintainable Under the Tort Claims Act

The respondent's suit in this case was premised upon the holding of the United States Supreme Court in *United States v. Muniz,* 374 U.S. 150. This Court held in that case that suits under the Tort Claims Act could be maintained by Federal Prisoners for personal injuries sustained during confinement in prison by reason of negligence of government employees. This Court reached its decision only after a careful examination of the Tort Claims Act which was passed in 1946 and amended in 1961. In the Tort Claims Act, Congress gave Federal District Court jurisdiction

> "of single actions on claims against the United States for money damages, * * * for personal injury * * * caused by the negligent or wrongful act or omission of any employee of the Government while working within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 26 U.S.C. 1346 (b)[1]

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1 The act also provides that "the United States shall be liable, respecting the provisions of this title relating to Tort, in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 2674.

II

One Remedy Against the Government for Each Wrong Suffered Is Not a Universal Rule

The fact that Federal prisoners may sue under the Tort Claims Act should no longer be subject to question. The fact that a federal compensation system exists at the same time in no way is a bar to the right of prisoners to recover under the sweeping provisions of the Federal Tort Claims Act. The proposition cited to this Court by the government that there should be only one remedy against the government for each wrong suffered is by no means a universal rule. This Court on different occasions has upheld the proposition that a recovery can be achieved under the Tort Claims Act concurrently with the existence of a compensation system designed to cover the same injury.

In the case of *Brooks v. United States,* 387 U.S. 49, two brothers and their father were returning in an automobile along a public highway in North Carolina. The brothers were in the Armed Forces at the time the accident occurred. The accident occurred when their car was struck by a United States Army truck driven by a civilian employee of the Army. The plaintiffs in that case were covered under the Servicemens-Benefit Law. The government moved to dismiss their suit brought under the Tort Claims Act for the reason that the brothers were in the Armed Forces of the United States at the time of the accident and that the Servicemen's Acts provided an exclusive remedy. The Supreme Court held that provisions in other statutes for disability payments to servicemen and gratuity payments to their survivors which exist without making such payments exclusive or providing for an election of remedies as in the Federal

Employees Compensation Act, while providing for exclusiveness of remedy in specified instances indicate no purpose to forbid action against the United States under the Tort Claims Act. Therefore, in *Brooks v. United States,* supra, the plaintiffs were permitted recovery even though they were covered under an independent compensation system, which, like the Federal Prisoners Industries Act, did not provide that it was an exclusive remedy.

In *United States v. Brown,* 348 U.S. 110, the plaintiff brought a suit under the Tort Claims Act for damages for negligence for the treatment of his left knee in a Veterans Administration Hospital. The plaintiff was a discharged veteran who had injured his knee while on active duty prior to his discharge in 1944. It was during the second operation in 1951 that an allegedly defective tourniquet was used as a result of which the nerves in plaintiff's leg were seriously and permanently injured.

The government argued then, as it does now, that the plaintiffs sole relief was under a compensation system which was independent of the Tort Claims Act, being the Veterans Act. The District Court agreed with the contention of the government but the Court of Appeals reversed. On certiorari the United States Supreme Court affirmed the decision of the Court of Appeals. The Supreme Court held that the payment of compensation under the Veterans Act did not bar recovery against the United States under the Tort Claims Act for a negligent injury to a member of the armed forces which was not incident to or caused by military service. Again, in *Brown,* there were two concurrent remedies, the Tort Claims Act and Veterans Act. In

Brown, the plaintiff was receiving compensation under the Veteran's Act, yet he was not precluded from recovery under the Tort Claims Act. The *Brown* case was based upon an examination of the intention of Congress and the conclusion that Congress had given no indication that it had made the right of compensation under the Veterans Act an exclusive remedy and that Congress could, of course, make the compensation system exclusive. The Supreme Court noted that even the receipt of disability payments under the Veteran's Act did not preclude recovery under the Tort Claims Act.

III

Suits by Soldiers for Injuries in the Course of Service Are Not Analogous to Suits by Federal Prisoners

The government has suggested that the reasoning used in *Feres v. United States,* 340 U.S. 135, is applicable here, yet, it is significant that the Supreme Court felt compelled to comment on its own decision in *Feres* apparently because that decision had either been *interpreted too broadly or misinterpreted.*[2]

The *Feres* decision combined three cases. The common factor underlying the three cases was that each claimant, while on active duty and not on furlough, sustained injury due to negligence of others in the armed forces. *Feres* himself died in a fire in barracks at Camp Pine, New York, while on active duty, and

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2. "Since a number of lower courts have nevertheless reached a contrary conclusion, largely in reliance upon our decision in *Feres v. United States,* 340 U.S. 135, 71 S. Ct. 153, we deem it appropriate to make more detailed investigation into the intent of Congress. *United States v. Muniz,* 83 S. Ct. 1850, 374 U.S. 150 (1953).

negligence was alleged in quartering him in barracks which should have been known to be unsafe because of a defective heating plant and failing to maintain an adequate fire watch. The Supreme Court there denied recovery under the Tort Claims Act holding that the government is not liable under that Act for injuries to servicemen arising out of or in the course of activity incident to military service. It should be noted that the *Feres* decision did not disapproye of the Brooks case. Again, the Supreme Court felt it necessary to explain its own decision as the result of:

> "peculiar and special relationship of the soldier to his superiors, and effect of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty ***". *United States v. Brown,* 348 U.S. 112, 75 S.Ct. 141 (1954); *United States v. Muniz,* 83 S. Ct. 1850, 374 U.S. 150, (1963).

The reasoning supporting the decision in *Feres,* which the government urges as being persuasive, was rejected by the Supreme Court in the *Muniz* case for reason that suits by soldiers for injuries arising out of or in the course of their service simply does not present an analogous situation to a suit by a Federal prisoner. Although we find no occasion to question *Feres,* so far as military claims are concerned, the reasons for that decision are not compelling here. *United States v. Muniz,* 83 S. Ct. 1850, 374 U.S. 150 (1963). Thus, it has been made clear in the *Muniz* decision that the reasoning in *Feres* is not applicable to a situation involving Federal prisoners. An examination of the reasons cited

by the Court for the *Feres* decision reveals why an argument persuasive with soldiers injured in the course of duty is not persuasive with Federal prisoners.

Among the principal reasons articulated for *Feres* were:

(1) The absence of an analogous or parallel liability on the part of either an individual or a state;

(2) The presence of a comprehensive compensation system for service personnel;

(3) The dearth of private bills from the military;

(4) The distinctly Federal relationship of the soldier to his superiors and the Government;

(5) The variations in the State law to which the soldiers would be subjected.

We might add a sixth reason cited by the Court in *Feres*:

(6) a soldier is at a peculiar disadvantage in litigation. Lack of time and money, the difficulty if not impossibility of preparing witnesses, are only a few of the factors working to a disadvantage." *Feres v. United States,* 340 U. S. 135, 71 S. Ct. 153, (1963).

Previous judicial comment upon the pertinent argument raised by *Feres* as applicable to the Federal prisoner situation might prove interesting here.

"The first premise of the *Feres* decision was that no American law had ever—permitted a soldier to recover for negligence, against *either* his superior officers or the Government he is serving." (emphasis supplied) *Win-*

ston v. United States, 305 F. 2d 253 (1962). Circuit Judge Hincks noted that such a premise was not entirely factual as it related to federal prisoners; that suits by prisoners against jailers and local governments had been authorized prior to the passage of the Tort Claims Act, *Winston v. United States,* 305 F. 2d 253 (1962). Circuit Judge Hayes in the same case on rehearing also disagreed with the Government's contention: "This argument is not applicable to the case at bar because there is a close analogy in the *private liability of prison officials,* which is well-known in American law."

The second supporting argument in *Feres was that a comprehensive compensation system for service personnel existed.*

Recent decisions and a logical analysis of 18 U.S.C.A. 4126 clearly establishes that the prison compensation system is not an adequately comprehensive compensation system sufficient to indicate an intention on the part of Congress to preempt the sweeping provisions of the Federal Tort Claims Act by reason of the sketchy, discretionary and highly restrictive provisions of 18 U.S.C.A. 4126. This topic will be treated at a later point in this brief under heading VI

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3. *Hill v. Gentry,* 280 F.2d 88 (C.A. 8) Cert. denied, 364 U.S. 875, 81 S. Ct. 119, 5 L. Ed. 2d 96 (1960); *Asher v. Zabell,* 50 F. 818 (C.A. 5, 1892).

Further, the pertenance of *Feres* is at best questionable in view of *Rayonier* where it was said, 352 U.S. 319, 77 S. Ct. 377: "It may be that it is 'novel and unprecedented' to hold the U.S. accountable for the negligence of its fire fighters, but the very purpose of the Tort Claims Act was to waive the Government's traditional all-encompasing immunity from tort actions and to establish novel and unprecedented governmental liability."

The fourth reason supporting *Feres* was the distinctly *Federal* relationship of the soldier to his superiors and the government. Justice Hincks in *Winston v. United States,* 305 F.2d 253, at 256, found that this premise was based on considerations of military efficiency and that such considerations were irrelevant to the Government-prisoner relationship.

The brief of the Government before this Court and the decision of the Court in *Feres* repeatedly emphasized that the Tort Claims Act should be construed to fit "so far as will comport with its works, into the entire statutory system of remedies against the Government to make a workable consistent equitable hold." *Feres v. United States,* 310 U.S. 135, 71 St. Ct. 153, (1963).

Circuit Judge Hayes, speaking for the majority in *Winston v. United States,* at 268, commented: "Of course this consideration has no application whatsoever to the case at bar. Federal prisoners have, with a limited exception, no alternative means of redress and private bills on their account unquestionably demanded the attention of Congress. * * * *Thus, a rule of construction* favoring the attainment of an 'equitable hold' is *persuasive of liability."* (emphasis supplied)

After reading the *Feres, Muniz* and *Winston* decisions, the conclusion is inescapable that the Supreme Court did not feel that the reasoning used to reach the result that a serviceman while on active duty was denied recovery under the Tort Claims Act was applicable to the situation where a Federal prisoner was injured as a result of Government negligence.

IV

Because the Federal Employees Compensation Act Precludes Recovery Under the Tort Claims Act Does Not Require That All Federal Compensation Systems Be Interpretated as Providing the Exclusive Remedy

In addition to the *Feres* decision, the government has suggested that those decisions interpreting the Federal Employees Compensation Act should be heeded here. Such is plainly not the case; nor should the fact that the government has provided a detailed examination repleat with numerous citations of the situation which exists when recovery exists under the Federal Employees Compensation Act concurrently with an attempted recovery under the Tort Claims infer by the length of the discussion that the situations are analogous.

The holding in *Johansen v. United States,* 343 U.S. 427, 72 S. Ct. 849 (1952), was that the Federal Employees Compensation Act was enacted to provide for compensation for injuries to all Government employees in the performance of their duties, and that such a comprehensive plan for waiver of sovereign immunity should be regarded as providing an exclusive remedy. The result was that the plaintiff was precluded from recovery under the Public Vessels Act. The basis for the decision was a feeling by the court that there existed a system of *simple, certain,* and *uniform* compensation for injuries or death which evidenced a congressional intent to make the Federal Employees Compensation Act exclusive. The argument there was that had Congress intended to provide for recovery by another means of compensation, such recovery would have been specifically provided.

It cannot be argued that because one Federal compensation system was found, upon an examination of its language, to preclude recovery under the Tort Claims Act that all Federal compensation systems may be interpreted to be similarly exclusive. Certainly it is the case that when facts of a claim under the Tort Claims Act do not fall within any express exception, the facts must be considered in relation to the language of the act itself. *Small v. United States,* 219 F. Supp. 659 (Delaware, 1963). Secondly, it is the respondent's position that the prisoners compensation system, unlike the Federal Employees Compensation Act, does not provide a "system of simple, certain, and uniform compensation for injuries or death."

V

The Supreme Court of the United States Will Not Pronounce a Doctrine of Election of Remedies When Congress Has Not Done So and Especially When There Is no Showing of Any Congressional Intention to Establish Such Exclusive Remedy

The government seemingly argues that the doctrine which has found favor in many decisions, that there should exist a single exclusive remedy against the Government, precludes recovery under the Tort Claims Act. It has already been pointed out that this doctrine is not universal and has not always been accepted by the Supreme Court itself.

In addition to providing three instances in which the Tort Claims Act itself was the exclusive remedy, Congress qualified its waiver of Governmental immunity in 28 U.S.C. 2680 by excepting from the Act claims arising from certain Government activity. "None of

the exceptions preclude suit against the Government by prisoners for injuries sustained in prison." *United States v. Muniz*, supra.[4]

In the *Feres* decision, the court noted four possible conclusions which might be reached from an interpretation of the facts involved in wrongs incident to service whereby a claim is made under the Tort Claims Act while covered under one of the Serviceman's Acts. These conclusions:

(a) The claimant might enjoy both types of recovery.

(b) The claimant might elect which remedy to pursue, thereby waiving the other.

(c) The claimant might pursue both remedies, crediting the larger liability with proceeds of the smaller.

(d) The claimant might be denied recovery under the Tort Claims Act for the reason that the compensation and pension recovery excluded the Tort remedy.

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4 "An examination of the legislative history of the act reinforces our conclusion that Congress intended to permit such suits. For a number of reasons, it appears that Congress was well aware of claims of Federal prisoners and that its failure to exclude them from the provision of the act in 28 U.S.C. 2680 was deliberate." * * * "Considering the plain import of the statutory language of the number of prisoners claims among the individual applications for private bills leading to the passage of the Federal Tort Claims Act, the frequent mention of prisoner claims exceptions in proposed bills, and the reference among others, to New York law, which permitted recovery by prisoners, we believe it is clear that Congress intended to waive soverign immunity in cases arising from prisoners' claims." *United States v. Muniz*, 83 S. Ct. 1850, 374 U.S. 150, (1963).

The Court concluded after an examination of these four possibilities that: "There is as much statutory authority for one as for another of these conclusions." *Feres v. United States,* 340 U.S. 135, 71 S. Ct. 153, (1963).

The reasoning used in *Brooks v. United States,* 337 U.S. 49, 69 S. Ct. 918, 92 L. Ed. 1200 (1949) is also applicable. The Supreme Court then found that the exceptions to the Tort Claims Act were too lengthy and too specific to ignore. The clear fact was that Congress intended *those exceptions alone to bar claims under the Tort Claims Act.* (emphasis supplied) Just as the Court in *Brooks v. United States* found that provisions in other statutes dealing with disability payments to servicemen and gratuity payments to survivors indicated no purpose to forfeit tort actions under the Tort Claims Act so, it is submitted that no such purpose can be found under the Federal Prison Industries Act: "We *will not call either remedy in the present case exclusive nor pronounce a doctrine of election of remedies when Congress has not done so.*" (emphasis supplied) *Brooks v. United States,* 337 U.S. 49, 59 S. Ct. 918 (1949).

The Respondent's present position is perhaps best stated at page 265 of *Winston v. United States,* 305 F. 2d 253 (1962):

> "The Act lists thirteen kinds of claims as to which immunity is not waived. None of these exceptions remotely relates to claims by persons who have suffered injury while being held in a federal prison (28 U.S.C. 2680 (1958). The House Report on the bill which later became the Federal Tort Claims Act stated that:

> 'The present bill would establish a uniform system authorizing the administrative settlement of small tort claims and permitting suit to be brought on *any tort claim * * * with the exception of certain classes of torts expressly exempted from operation of the act.'* (Emphasis supplied.) H. R. No. 1287, 79th Congress, 1st Sess. 3 (1945).
>
> "The care with which Congress detailed the express exclusion from the coverage of the Act of those situations in which the right of recovery was considered undesirable (H.Rep. No. 1287, supra at 5-6 (1945)), leaves no room for the exception of additional situations which would otherwise be covered by the statute.
>
> 'There is no justification for this Court to read exemptions into the Act beyond those provided by Congress. If the Act is to be altered that is a function for the same body that adopted it.' *Rayonier, Inc. v. United States,* 352 U.S. 315, 320, 77 S. Ct. 374, 377, 1 L. Ed.2d 354 (1957).

The government advances a novel thesis of legislative construction. Since Congress promulgated legislation in 1934 for injuries suffered by inmates prior to the enactment of the Federal Tort Claims Act in 1946 and amended the inmates Compensation Act to include "work activity in connection with maintenance or operation of the institution where confined" in 1961—prior to the Muniz decision of 1963 when inmates were first recognized by the Supreme Court of the United States to be within the ambit of the Federal Tort Claims Act, the government argues that the logical sylogism follows that Congress intended compensation to be the exclusive remedy.

In other words, the government inferentially argues that the enactment of any form of compensation no matter how weak, impotent, ineffective and restrictive in coverage, must constitute the sole basis of relief so that when compensation was limited to the 20% of inmates engaged in prison industries, it was the exclusive remedy, despite the Federal Tort Claims Act which became operative in 1946. That it is absolutely inconceivable, says the government, that when Congress enacted the Federal Tort Claims Act in 1946 and specifically enumerated therein all exceptions to which it did not apply and failed to exclude among the exceptions inmates injured through negligence of the United States of America, that Congress could not have been thinking about the untenable and helpless position in which prisoners have been placed by virtue of the skimpy and abortive relief given them under the Act of 1934.

Furthermore, is it inconceivable that Congress did intend Federal inmates to secure relief under the provisions of the Federal Tort Claims Act, despite its enactment of the Amendment of Section 4126 in 1961.

> "The House Report on the legislation expanding coverage for injuries to prisoners engaged in prison industries noted that no alternative avenues of relief were open, a statement demonstrably true in light of the consistent course of judicial interpretation of the Act. We do not consider that the passage of this remedial legislation, *which is not inconsistent with any tort remedy,*" (emphasis supplied) "should be held to eliminate a prisoner's right to sue under the Tort Claims Act, because a committee of Congress, in reliance on judicial decisions with which we cannot agree, thought that this right did

not exist. Commissioner of Internal Revenue v. Estate of Arents, supra, 297 F.2d at 397." *Winston v. United States,* 305 F.2d 253 at 273.

For all intents and purposes the government is inferentially telling this Court to resolve all doubts against Federal prisoners and to invoke the thesis that Congress intends and desires to stigmatize Federal prisoners and relegate them to inferior status relative to their civil rights for tort liability.

Where Congress has intended a compensation system to be exclusive it has generally said so in the governing statute. See provisions of Federal Employees Compensation Act, 63 Stat. 865 (1949) 5 U.S.C. 757(b); Longshoremen's and Harbor Workers Compensation Act, 44 Stat. 1424 (1927) 33 U.S.C. 905 (1946).

At what point does a compensation act, where other relief exists for tort liability become the exclusive form of relief to the exclusion of all other relief? Is it when any compensation act exists—regardless of how meager and limited?

Is it not reasonable to conclude that Congress intended to provide some form of compensation in circumstances where inmates suffered injury due to no fault of the United States and at the same time permit inmates to seek redress under the Federal Tort Claims Act where such injury was induced by a negligent act of the United States of America.

VI

There is no Simple, Certain Uniform System of Compensation for the Injuries or Death of Federal Prisoners to Evidence the Congressional Intent to Provide An Exclusive Remedy

The compensation scheme for prisoners is very different from the compensation system under the Federal Employees Compensation Act and the compensation system for servicemen which was described in *Feres* as being simple, certain and uniform; nor does it in any way conform with the requirement enunciated in *Johanson v. United States,* 343 U.S. 427, that a compensation system is the exclusive remedy only when it covers all employees in the absence of specific exceptions.

Judge Hincks stated in his opinion in *Winston v. United States,* 305 F.2d 253 at 257 that: "in comparison with the military compensation program 38 U.S.C. 700 (1958), [now 101 (13)], which affords relief for virtually all service-incurred injuries, see 340 U.S. at 145, 71 S. Ct. 163, the prison work-compensation plan is vastly less comprehensive and is in *no real sense a substitute for tort liability.*" (emphasis supplied)

The Prison Compensation Act is vastly different from the right to compensation enjoyed by government employees under the Federal Employees Compensation Act:

1. It is permissive rather than mandatory.

2. The amount of the award rests entirely within the discretion of the Attorney-General, but may not, under the statute, exceed the amount payable under the Federal Employees Compensation Act. For instance, the

Federal Employees Compensation Act sets rigid standards which mathematically determine the amount of recovery while under the prison system the amount of the award is entirely within the discretion of the Attorney General. No more is authorized than under the Federal Employees Compensation Act but no minimum is fixed. Awards have run from $50.00 for the loss of a finger to $4,000.00 for death.[5]

3. Compensation is paid only upon the inmate's release from prison and will be denied if full recovery occurs while he is in custody and no significant disability remains after his release.[6]

4. There is no provision for the claimant to have a personal physician present at his physical examination.[7]

5. There is no opportunity for administrative review.[8]

6. Compensation, even when granted, does not become a vested right, but is to be paid only so long as the claimant conducts himself in a lawful manner and may be immediately suspended *upon conviction of any crime or incarceration in a penal instituiton.*[9]

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5. See Note 63 Yale Law Journal 418-423 (1954).

6. Federal Prison Industries, Inc., Inmate Accident Compensation Regulations, Sec. 11, 28 C.F.R., Sec. 301.1, 301.2.

7. Compare Federal Employees Compensation Act, §21, 5 U.S.C. §771.

8. Compare Federal Employees Compensation Act, § 37, as amended, 5 U.S.C. § 787.

9. Federal Prison Industries, Inc., Inmate Accident Compensation Regulations § 16, 28 C.F.R. § 301.5

7. Compensation is not available to unemployable inmates including the sick, the aged, and those with serious physical and mental handicaps.

8. Compensation is not available to those inmates newly admitted and those in transit from one institution to another.

9. Compensation is not available to inmates confined to penal institution in the District of Columbia which are beyond the reach of 18 U.S.C. 4126.

10. Compensation is not available to inmates engaged in certain types of road construction and in activities which do not relate to prison industry or institutional maintenance.[10]

11. Compensation is not available to inmates as a result of deliberate or intentional attacks of fellow inmates.[11]

12. Compensation is not available for inmates who are loaned to military bases and who are injured while doing work on said bases.[12]

13. Compensation is not available to inmates who may be injured during confinement at any other time than when engaged in performance of prison industry or maintenance activity.

> "What emerges on examination, therefore, is a severely restrictive system of compensation permeated at all levels by the very prison control and

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10. Lack v. United States, 262 F.2d 167.

11. James v. United States, 280 F.2d 428.

12. Seeber v. United States, 2 F. Supp. 68 (Eastern District of Tenn.).

dominion which was at the origin of the inmate's injury. This discretionary and sketchy system of compensation, which would not even have covered the present plaintiff in 1946, may not be deemed the equivalent of compensation under the Federal Employees Compensation Act of 1916." *Demko v. United States,* Appellant, 350 F.2d 698.

The essence of *Johansen* is that the Federal Employees Act is so comprehensive a system of coverage of all government employees that it is presumably intended to be their exclusive remedy.

It is noteworthy that a reference to the factual events involved in the *Feres* case, on which the government places much of its reliance, involving as it did, the death of a soldier as a result of a fire in barracks at Camp Pine, New York, while on active duty, and wherein compensation was awarded,—that such an event would not allow for compensation to inmates in a Federal prison under the Prison Compensation Act unless by sheer coincidence the fire occurred when inmates were engaged in prison industry or maintenance. So that factually no basis of recovery would exist for prison inmates based upon the events of the Feres tragedy.

A Federal prisoner is engaged in his occupation of being a federal inmate 24 hours per day just as a federal employee is committed to his occupation 8 hours a day. If a chandelier were to fall on a federal employee in the Federal Building at Pittsburgh, no doubt exists but that he would be covered under the provisions of the Federal Empolyees Compensation Act. If such an event happened in a Federal penitentiary such inmate injured would not be covered unless by bare coincidence at the time he was engaged in prison industry or maintenance.

So it is if a fire were to occur in the Federal Building at Pittsburgh, federal employees would be covered for injuries which they sustained while on Federal property under the Federal Employees Compensation Act. No such relief would be availible to Federal inmates.

Let us assume that the walls of the Federal penitentiary at Lewisburg were to suddenly collapse during their sleeping hours. Despite the fact that if such an event were to occur involving military personnel the Veterans Compensation Act would cover all soldiers injured, no relief whatver would be available to inmates under the provisions of the Prison Compensation Act.

To say that 18 U.S.C. 4126 provides the benefits and is comprehensive and all inclusive on a parallel with the Federal Employees Compensation Act or the Soldiers Compensation Act, is like saying that a two year old infant is an equal to Joe Louis in the boxing ring.

If Congress were to place Federal inmates under the all embracing and comprehensive provisions of the Federal Employees Compensation Act perhaps the government's argument would be well taken that Congress has provided an exclusive remedy—but to take what the United States Court of Appeals for the Third Circuit aptly describes as a "severely restrictive system of compensation permeated at all levels by the very prison control and dominion which was at the origin of the inmate's injury" a discretionary and sketchy system of compensation—and substitute said system in lieu of rights existing under the provisions of the broad and sweeping Federal Tort Claims Act would certainly do violence to the purport and efficacy of Congressional enactment. Indeed, if Congress intended to render impotent the provisions of the Federal Tort Claims Act

by a feeble and restrictive compensation enactment, it would appear logical that Congress would have clearly expressed such an intent.

VII

Sound Public Policy Militates in Favor of the Right of Prisoners to Seek Relief Under the Federal Tort Claims Act

Sound public policy, as amply demonstrated by Congressional intent, irrefutably supports the right of an inmate to litigate his injury under the Federal Tort Claims. The inmate is in an inferior position—completely at the mercy and whim of prison guards. The prisoner is less able to protect himself from another's negligence than is a private individual. He must live and work under conditions imposed on him. *"The prisoner is permitted to do nothing except under direction of the officers of the prison." Sutherland,* Principles of Criminology 410 (1934) (emphasis supplied). He cannot readily question the instructions of those entrusted with his care and supervision.

What would do more to eliminate sadistic, brutal and inhumane guards from the rosters of federal penal institutions than the realization that to subject inmates to dangerous work assignments without reasonable safeguards normally provided federal employees or any other employees, would subject the government to tort liability?

What would militate more in the direction of normal safeguards, safety devices and responsible supervision than the guiding surveillence of the courts manifested in financial awards commensurate with the degree of injury suffered and predicated upon the law of negligence.

What more glaringly illustrates this truism than the facts of the instant case, wherein the respondent was given a highly dangerous and almost impossible assignment to perform? What federal employee or independent employee, who was not subject to the consequences of prison discipline and acting as a free agent, would have been willing to perform this dangerous assignment without the aid of scaffolding, step ladders or appropriate safety equipment?

The government points out the liberality of the compensation award indicating that $180.00 per month is possibly the maximum respondent would receive under Pennsylvania Workmen's Compensation or similar state statutes. What the government fails to appreciate is that given normal treatment and standards of work which exist in private industry or government, this accident would not have happened.

Since an inmate has no freedom of choice and is permitted to do nothing except under the direction of the officers of the prison, he is a ward of the prison just as a seaman is a ward of the ship requiring unusual care and protection because of the unique position in which he is placed.

CONCLUSION

For the reasons stated, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,
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Attorney for Respondent

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SUPREME COURT OF THE UNITED STATES

No. 76.—October Term, 1966.

United States, Petitioner, v. Stephen Robert Demko.	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[December 5, 1966.]

Mr. Justice Black delivered the opinion of the Court.

The respondent Demko, a federal prisoner, was seriously injured in 1962 in the performance of an assigned prison task in a federal penitentiary. Shortly afterward he filed a claim for compensation benefits under 18 U. S. C. § 4126. That law, first enacted by Congress in 1934, authorized the Federal Prison Industries, Inc., a federal corporation, to use its funds "in paying, under rules and regulations promulgated by the Attorney General, compensation . . . to inmates or their dependents for injuries suffered in any industry." [1] Under that law and regulations promulgated under it, respondent was awarded $180 per month which was to start on discharge from prison and continue so long as disability continued.[2] After winning this compensation award, respondent brought this action against the United States in the Federal District Court under the Federal Tort Claims Act,[3] alleging that his injury was due to the Government's negligence for which he was entitled to recover

[1] Act of June 23, 1934, c. 736, § 4, 48 Stat. 1211. The Federal Prison Industries was established as a District of Columbia corporation and a "governmental body" to expand an industrial training and rehabilitation program for prisoners initiated by the Act of May 27, 1930, c. 340, 46 Stat. 391.

[2] On August 1, 1966, Federal Prison Industries, Inc., raised respondent's award to $245.31 per month under authority of the Act of July 4, 1966, 80 Stat. 252, amending the Federal Employees Compensation Act, 39 Stat. 742, as amended, 5 U. S. C. § 751 *et seq.*

[3] 28 U. S. C. §§ 1346 (b), 2671 *et seq.*

additional damages under that Act. The United States defended on the single ground that respondent's right to recover compensation under 18 U. S. C. § 4126 was his exclusive remedy against the Government barring him from any suit under the Federal Tort Claims Act. The District Court, holding that compensation under 18 U. S. C. § 4126 was not his exclusive remedy, rejected this defense and accordingly entered a judgment for the respondent against the United States for tort claim damages based on stipulated facts. The Court of Appeals for the Third Circuit affirmed. 350 F. 2d 698. Subsequently the Court of Appeals for the Second Circuit, in *Granade* v. *United States,* 356 F. 2d 837, reached precisely the opposite result holding that a prison inmate, injured in prison employment and eligible for compensation under 18 U. S. C. § 4126, is precluded from suing under the Federal Tort Claims Act. To resolve this conflict we granted certiorari. 383 U. S. 966.

Historically, workmen's compensation statutes were the offspring of a desire to give injured workers a quicker and more certain recovery than can be obtained from tort suits based on negligence and subject to common-law defenses to such suits. Thus compensation laws are practically always thought of as substitutes for, not supplements to, common-law tort actions. A series of comparatively recent cases in this Court has recognized this historic truth and ruled accordingly. *Johansen* v. *United States,* 343 U. S. 427, and *Patterson* v. *United States,* 359 U. S. 495, for instance, are typical of the recognition by this Court that the right of recovery granted groups of workers covered by such compensation laws is exclusive. Such rulings of this Court have established as a general rule the exclusivity of remedy under such compensation laws.[4] In *Johansen* v. *United States, supra,* at 440–441,

[4] The lower federal courts have held, uniformly, that persons for whom the Government has supplied an administrative compensation

this Court stated "where the Government has created a comprehensive system to award payments for injuries, it should not be held to have made exceptions to that system without specific legislation to that effect." Later in *Patterson* v. *United States, supra,* at 496, this Court emphatically refused to abandon the *Johansen* ruling calling attention to the fact that Congresses by specific statute could change the *Johansen* "policy at any time." Consequently we decide this case on the *Johansen* principle that, where there is a compensation statute that reasonably and fairly covers a particular group of workers, it presumably is the exclusive remedy to protect that group.

There is no indication of any congressional purpose to make the compensation statute in 18 U. S. C. § 4126 nonexclusive. It was enacted in 1934, and provided for injured federal prisoners the only chance they had to recover damages of any kind. Its enactment was 12 years prior to the 1946 Federal Tort Claims Act. There is nothing in the legislative history of this latter Act which pointed to any purpose to add tort claim recovery for federal prisoners after they had already been protected by 18 U. S. C. § 4126. Indeed to hold that the 1946 Federal Tort Claims Act was designed to have such a

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remedy are precluded from seeking recovery against the United States for injuries received in the course of their work under the Federal Tort Claims Act, the Jones Act, the Suits in Admiralty Act, or the Public Vessels Act. *Jarvis* v. *United States,* 342 F. 2d 799, cert. denied, 382 U. S. 831; *Rizzuto* v. *United States,* 298 F. 2d 748; *Lowe* v. *United States,* 292 F. 2d 501; *Somma* v. *United States,* 283 F. 2d 149; *Mills* v. *Panama Canal Co.,* 272 F. 2d 37, cert. denied, 362 U. S. 961; *United States* v. *Forfari,* 268 F. 2d 29, cert. denied, 361 U. S. 902; *Balancio* v. *United States,* 267 F. 2d 135, cert. denied, 361 U. S. 875; *Aubrey* v. *United States,* 254 F. 2d 768; *United States* v. *Firth,* 207 F. 2d 665; *Lewis* v. *United States,* 190 F. 2d 22, cert. denied, 342 U. S. 869. See also *Gradall* v. *United States,* 329 F. 2d 960, 963; *Denenberg* v. *United States,* 305 F. 2d 378, 379–380.

supplemental effect would be to hold that injured prisoners are given greater protection than all other government employees who are protected exclusively by the Federal Employees Compensation Act,[5] a congressional purpose not easy to infer.

The court below refused to accept the prison compensation law as an exclusive remedy because it was deemed not comprehensive enough. We disagree. That law, as shown by its regulations, its coverage and the amount of its payments to the injured and their dependents, compares favorably with compensation laws all over the country.[6] While there are differences in the way it protects its beneficiaries, these are due in the main to the differing circumstances of prisoners and nonprisoners. That law, as the Solicitor General points out, offers far more liberal payments than many of the state compensation laws, and its standard of payments for prisoners rests on the schedules of payment of the Federal Employees Compensation Act which Congress has provided to take care of practically all government employees. This particular federal compensation law, created to meet, in the accepted fashion of such laws, the special need of a class of prisoners, has now for more than 30 years functioned to the satisfaction of Congress, except as Congress broadened its coverage in 1961.[7] Until Congress decides differently we accept the prison compensation law as an adequate substitute for a system of recovery by common-law torts.

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[5] 39 Stat. 742, as amended, 5 U. S. C. § 751 *et seq.*

[6] The regulations governing awards of workmen's compensation to federal prisoners appear at 28 CFR §§ 301.1–301.10 (1965 rev.).

[7] In 1961 Congress expanded the coverage of 18 U. S. C. § 4126 to include not only prisoners' injuries suffered in "any industry" but also in "any work activity in connection with the maintenance or operation of the institution where confined." Act of September 26, 1961, 75 Stat. 681, 18 U. S. C. § 4126.

The court below was of the opinion that its holding was required by *United States* v. *Muniz*, 374 U. S. 150. We think not. Whether a prisoner covered by the prison compensation law could also recover under the Federal Tort Claims Act was neither an issue in nor decided by *Muniz*. As our opinion in *Muniz* noted, neither of the two prisoners there was covered by the prison compensation law. What we decided in *Muniz* was that the two prisoners there involved, who were not protected by the prison compensation law, were not barred from seeking relief under the Federal Tort Claims Act. However, that is not this case. The decision in *Muniz* could not possibly control our decision here because respondent is protected by the prison compensation law.[8] All other arguments of respondent have been considered but we find none sufficient to justify recovery under the Federal Tort Claims Act. The judgments of the courts below are reversed with direction to sustain the Government's defense that respondent's recovery under the prison compensation law is exclusive.

Reversed.

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[8] In this case, the Government stipulated that respondent's "right to compensation pursuant to 18 U. S. C. § 4126 is not affected by this suit. Regardless of the outcome of this suit [respondent] will have the same right to compensation as if suit had not been instituted."

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SUPREME COURT OF THE UNITED STATES

No. 76.—October Term, 1966.

United States, Petitioner, *v.* Stephen Robert Demko.	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[December 5, 1966.]

Mr. Justice White, whom Mr. Justice Douglas joins, dissenting.

United States v. *Muniz*, 374 U. S. 150, held that action under the Federal Tort Claims Act was available to federal prisoners injured by the negligence of government employees. Given that case, the respondent, who was injured by government negligence while a federal prisoner, is entitled to relief unless the compensation available to him under 18 U. S. C. § 4126 is his exclusive remedy, a proposition which rests on the intent of Congress to give § 4126 that effect. Certainly the section does not in so many words exclude other remedies; and in my view exclusivity should not be inferred, for § 4126 is neither comprehensive nor certain and does not meet the tests of *Johansen* v. *United States*, 343 U. S. 427, and of *Patterson* v. *United States*, 359 U. S. 495. Section 4126 permits, but does not require, the application of prison industries income to some form of compensation scheme. The scheme adopted by the Attorney General applies to only a limited class of prisoners—those doing prison industry, maintenance, or similar work. A prisoner injured in prison industry work gets no compensation under the plan until he is released and none then if he has completely recovered. Furthermore, his payments stop if he is reincarcerated. If he dies while in prison, he gets nothing at all. On the other hand, if a prisoner is injured by the negligence of a prison guard and is not covered by the § 4126 plan, he may sue and

recover under the Tort Claims Act. Recovery is his and when he gets it, he keeps it whether or not he dies before his prison term expires and whether or not he is released and then again imprisoned.

Essentially, I agree with Judge Freedman, who wrote the opinion for the Court of Appeals for the Third Circuit. The following is a passage from his opinion:

> "Congress in adopting the amendment of 1961 to § 4126 gave no express indication that the compensation authorized by it was to be exclusive, and its provisions preclude the imputation of any such intention. The compensation scheme for prisoners is very different from the compensation system for servicemen which was described in *Feres* as being 'simple, certain, and uniform' (340 U. S., at 144) at the time the Federal Tort Claims Act was passed in 1946. It is also vastly different from the right to compensation enjoyed by government employes under the Federal Employees' Compensation Act. It is permissive rather than mandatory. The amount of the award rests entirely within the discretion of the Attorney General, but may not under the statute exceed the amount payable under the Federal Employees' Compensation Act. Compensation is paid only upon the inmate's release from prison and will be denied if full recovery occurs while he is in custody and no significant disability remains after his release. There is no provision for the claimant to have a personal physician present at his physical examination, and there is no opportunity for administrative review. Finally, compensation, even when granted, does not become a vested right, but is to be paid only so long as the claimant conducts himself in a lawful manner and may be immediately suspended upon conviction of any crime, or upon incarceration in a penal institution.

> "What emerges on examination, therefore, is a severely restrictive system of compensation permeated at all levels by the very prison control and dominion which was at the origin of the inmate's injury. This discretionary and sketchy system of compensation, which would not even have covered the present plaintiff in 1946, may not be deemed the equivalent of compensation under the Federal Employees' Compensation Act of 1916. Nowhere can there be found any indication that Congress intended that it should serve to exclude prisoners from the broad and sweeping policy embodied in the Federal Tort Claims Act." 350 F. 2d 698, 700–701. (Footnotes omitted.)

Nor does respondent claim the right to cumulate his remedies; he concedes that recovery under the compensation scheme must be offset against any negligence award he would otherwise receive.

Respectfully, I dissent.